TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1886.

No. 307.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN J. TAUSSIG AND GEORGE W. TAUSSIG, EXECUTORS OF CHARLES TAUSSIG, DECEASED, AND MORRIS TAUSSIG.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED MARCH 19, 1887.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 13, 1889

1 The United States of America to Charles Taussig and Morris Taussig, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein John Glenn, trustee of the National Express and Transportation Company, is plaintiff in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 14th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

[Endorsed:] 2673. United States circuit court, eastern district of Missouri. John Glenn, trustee of the National Express and Transportation Company, *vs.* Charles Taussig and Morris Taussig. Citation. Filed Dec. 14, 1886. A. P. Selby, clerk.

We accept service of this citation.
St. Louis, Dec. 22nd, 1886.
BOYLE, ADAMS & McKEIGHAN,
Att'ys for Defendants in Error.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1886, thereof, between John Glenn, trustee of the National Express and Transportation Company, plaintiff, and Charles Taussig and Morris Taussig, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said

Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk Circuit Court United States, Eastern District of Missouri.

Allowed by—
SAMUEL TREAT, *Judge.*

[Endorsed:] No. 2673. United States circuit court, eastern district of Missouri. John Glenn, trustee, *vs.* Charles Taussig *et al.* Writ of error to the circuit court of the U. S., eastern dist. of Missouri. Returned and filed 14th day of Dec., 1886. A. P. Selby, clerk.

Return to Writ.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office, in the city of St. Louis, this 2d day of February, A. D. 1887.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

A. P. SELBY,
Clerk of said Court.

3 *Amended Petition.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the fourteenth day of December, A. D. 1886, there was filed in said court a certain amended petition in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
CHARLES TAUSSIG and MORRIS TAUSSIG, Defendants.

The plaintiff, a citizen of the State of Maryland, complains of the defendants, citizen- of the State of Missouri, and who, in the year 1865 and long afterwards, together with one J. H. Livingston, constituted the firm of Taussig, Livingston & Company, and for cause of action states that the defendants in their said firm name, heretofore subscribed for one hundred shares of the capital stock of the National Express and Transportation Company, a body corporate of the State of Viginia, duly incorporated under the laws thereof, pursuant to an act of the General Assembly of said State, approved December 12, 1865, entitled "An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 12, 1861, and to incorporate the National Express and Transportation Company," and thereby agreed to be liable to said company and undertook and
4 promised to pay said company for each and every share so subscribed for by said defendants the sum of one hundred dollars, in such installments and at such times as said defendants might be lawfully called upon and required to pay the same, according to the legal tenor and effect of the laws under which said company was so incorporated and said subscription to said stock made by said defendants, whereby and by force of said subscription said defendants became and were received and admitted as a stockholder- in said company, and undertook and agreed to sue and be sued, implead and be impleaded, contract and be contracted with in said corporate name, as to all matters touching and affecting the property, rights, and obligations of said corporation.

And plaintiff further says that on the twentieth day of September, 1866, the said National Express and Transportation Company, having become insolvent, by its deed of that date, duly executed, acknowledged, and recorded, assigned and transferred to John Blair Hoge and C. Oliver O'Donnel, both citizens of the State of Maryland, and John J. Kelly, a citizen of the State of New York, in trust for the benefit of the creditors of said company, all its property, rights, credits, and effects of every kind, in trust, to collect all the debts, claims, and moneys payable, to reduce the same to money, and to apply the proceeds thereof to the trusts declared by said deed, including the trust therein declared for the payment of the debts of said company, in the order of priority therein provided, and to employ agents, clerks, counsel, attorneys, and servants for the proper execution of the said trusts, and shortly thereafter ceased to do business and the defendants assented and agreed to the

said deed of trust, and thereby became bound and undertook and promised to pay to said trustees for each and every share of stock so as above stated, subscribed for by him, the balance of
5 the one hundred dollars due on each share of stock uncalled for at the time of the making of said trust deed, whenever the said defendants might be lawfully called upon to pay the same according to the legal tenor and effect of the laws under which said company was so incorporated and said subscription to said stock made.

And plaintiff further says that at the time of the execution and delivery of said deed of trust the said company had called for and required to be paid by the person legally bound to pay therefor, including the defendants, only a part, to wit, 20 per cent., of the par value of said stock, and had suffered and permitted the residue of said par value of said stock to remain uncalled for in the hands of the persons legally liable to pay for the same, including the defendants, which said balance of 80 per cent. remained in the hands of said persons, including said defendants, to be paid by them to said company as and when the same should be required to be paid, according to the terms of the subscription therefor and the laws of the State of Virginia applicable to said contracts of subscription.

And the plaintiff further says that the trustees so appointed by said deed failed and neglected to perform the trusts thereby created, and the validity and effect of said deed were drawn in question in the courts of various States in which the stockholders of said company resided, and the enforcement thereof was thereby greatly retarded and hindered; and he further says that afterwards, in November, 1871, one William W. Glenn, of the city of Baltimore, being a judgment creditor of said company for a large amount, filed a bill in the chancery court of the city of Richmond, being a court of competent jurisdiction in such cases, in his own behalf and in behalf of all other creditors of said corporation, against said National Express and Transportation Company and certain of its officers
6 and against the trustees named in said deed of trust as defendants, by which bill of complaint it was, among other things, sought to obtain from said court a judicial determination of the validity of said deed and a judicial construction thereof and the establishment of the legal effect and obligation of the same upon all property, rights, and persons affected thereby, and also to enforce the trusts thereby declared in favor of the creditors of said corporation; that pending said bill said W. W. Glenn died, and in the year 1879 the suit was revived in the name of John W. Wright, sheriff of the said city of Richmond, and as such duly constituted official administrator of said W. W. Glenn; that after such revivor an amended bill was filed, to which bill the said National Express and Transportation Company, certain of its officers, and the said Hoge and Kelly were made defendants (the said O'Donnell having in the meantime died); that by said bill it was sought to obtain in addition to the relief prayed for in the original bill an account and establishment of the debts due by said company and secured by said deed of trust and an account of the property and estate subject to the terms of said deed, including the amount of capital stock yet

remaining unpaid by the holders thereof and uncalled by said company and subject to be applied to the payment of the debts of said company; the removal of said surviving trustees and the appointment of a new trustee or trustees in their room, and an assessment or call to be made by the court upon the uncalled and unpaid capital stock and the persons liable to pay the same, for the purpose of providing means to pay the debts of said corporation and for other appropriate relief.

And the plaintiff further says that said company was duly served with process in said cause in accordance with the laws and practice of the State of Virginia; certain of its officers were summoned and the said surviving trustees appeared voluntarily to said
7 suit and answered said original and amended bills, whereby said court acquired full jurisdiction to decree as to all the matters and things involved in said suit.

And the plaintiff further says that such proceedings were had in said cause that on the 14th day of December, 1880, the said court did, among other things, adjudge, order, and decree as follows—that is to say:

1. That the said deed of trust of September 20, 1866, was a good and valid deed under the laws of the State of Virginia and binding upon the said corporation by which the same was executed.

2. That at the time of the execution of said deed the said corporation had called for twenty per cent. of the amount payable by the subscribers to and holders of its capital stock, and that eighty per cent. of said amount, being eighty dollars on each share of stock, remained unpaid and uncalled at the date of said decree and subject to be applied to the payment of the debts of said corporation secured by said deed of trust.

3. That the right to receive said unpaid and uncalled eighty per cent. of said capital stock from the persons liable to pay the same as and when the same should become payable by the terms of the contract between said company and the subscribers to and holders of its stock was vested by the said deed in the said trustees and the survivors of them, to be applied when so collected to the payment of the debts secured by said deed.

4. That said unpaid and unsettled eighty dollars per share was by the terms of the contract between said company and the persons liable to pay the same payable only in such amounts and at such times as the same might be required to be paid by said company, through its president and board of directors, and that no power or authority to sue for same or any part thereof was vested in said company or in said trustees under said deed of
8 trust unless and until such call should first be made by said corporation, and that the said trustees acquired no authority or power to make such call by force of said deed of trust or otherwise.

5. That there was no property or estate of said company wherewith to pay its debts, save and except the amount so remaining unpaid and uncalled of its capital stock, and that it was the duty of the proper officers of said corporation to call upon the persons liable

therefor to pay a sufficient amount of said unpaid and uncalled eighty dollars per share to carry out the trusts of said deed and pay the creditors secured thereby, but that said corporation and its proper officers had for many years wrongfully neglected and failed to make such call or assessment.

6. That the said unpaid and uncalled eighty dollars per share of said capital stock remaining in the hands of the holders thereof constituted a trust fund for the payment of the creditors of said company under said deed of trust, and that by reason of the neglect and failure of said corporation to call for the payment of a sufficient amount thereof to satisfy its debts and obligations under said deed of trust, and thereby enable said trustees to sue for and recover the amount so called, the said court possessed and would exercise aids power and would call for so much of said unpaid and uncalled amount as would be necessary to perform the trusts declared by said deed and pay the debts secured thereby.

7. That the said surviving trustees should be, and they were by the said decree, removed, and that the plaintiff should be, and he was by said decree, appointed in their room and stead to execute the trusts of said deed.

9 8. That there were numerous debts due and owing by said company and entitled to be paid under said deed of trust, amounting in the aggregate to $509,392.41, each of which debts was particularly ascertained and ordered by said decree to be paid.

And it was further adjudged, ordered, and decreed that it was necessary and proper that thirty per cent. of the par value of each share of said stock should be called for and required to be paid by the subscriber therefor and their assigns for the purpose of paying the debts of said company, under the provisions of said deed of trust; and it was accordingly adjudged, ordered, and decreed by said court in said cause that a call and assessment be, and the same was thereby, made upon the stock and stockholders of said company and their assigns of thirty per centum of the par value of said stock, being thirty dollars on each and every share thereof, the same when paid to be paid to and received by the said plaintiff, as trustee under said deed, in the room and stead of the original trustees therein named.

And the plaintiff further says that he accepted the appointment so made by said decree and complied with the terms and conditions thereof, and was and is duly qualified to act as such substituted trustee and to have the rights and perform the duties conferred upon and required of him by said decree.

And he further says by force of said decree and of the statute of the State of Virginia in such case made and provided, upon accepting such appointment as trustee and qualifying as such as required by said decree, he, the said plaintiff, then and there became and was and still is substituted to all the rights, powers, duties, and responsibilities of the trustees named in said deed of trust, and became and was and still is lawfully entitled to receive and collect the said assessment or call of thirty dollars per share on each and every

share of stock of said company from the persons liable to pay the same.

And the plaintiff further says that it was further adjudged,
10 ordered, and decreed that he, as such substituted trustee, be, and he was by said decree, authorized and directed to collect and receive the said call and assessment and to take such steps to that end as he should be advised.

And the plaintiff further says that by force of said contract of subscription to the stock of said company and said deed of trust and of said call and assessment so made by said decree and of the facts above stated the said defendants became and are indebted and liable to pay to him in the sum of three thousand dollars, being the amount of thirty dollars on each of said shares of the stock of said company so as aforesaid subscribed for by said defendants; and, being so liable to pay, the said defendants, in consideration thereof, promised to pay said sum to the plaintiff when thereto requested.

But he says that the defendants, although thereto requested, failed and refused to pay the same to the said plaintiff.

Plaintiff states that in the year 1884 he instituted suit in this court against defendants to enforce this liability; that on the 15th day of July, 1885, plaintiff suffered a nonsuit in said case.

Wherefore plaintiff prays judgment against defendants for the sum of three thousand dollars, with interest from Dec. 14, 1880, and for his costs.

For another cause of action plaintiff states that the suit instituted in the chancery court of the city of Richmond as aforesaid was after the 14th day of December, 1880, transferred to the circuit court of the county of Henrico, in the State of Virginia, a court of competent jurisdiction, and that such further steps were therein taken that on the 26th day of March, 1886, a further decree was entered in said cause adjudging that for the payment of a large balance
11 of the indebtedness of said company so established as aforesaid it was necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company, and ordering and decreeing that a call and assessment be made, and the same was thereby made, upon the capital stock and the stockholders of said company of fifty dollars on each and every share thereof, and requiring the stockholders of said company and each and every of them and their legal representatives and assigns to pay the several amounts thereby called for to this plaintiff, and authorizing and requiring this plaintiff to collect and receive said call and assessment and to take such prompt steps toward that end by suit or otherwise and in such jurisdictions as he might be advised.

Plaintiff further states that by reason of their ownership of stock in said company as hereinabove stated and by virtue of the decree last mentioned defendants became and are bound to pay the plaintiff the sum of five thousand dollars with interest from March 26th, 1886, at the rate of six per cent. per annum. Wherefore

plaintiff prays judgment for said sum, with interest, and for the cost of this suit.

T. K. SKINKER,
Attorney for Plaintiff.

Demurrer.

And afterwards, to wit, on the fourteenth day of December, A. D. 1886, there was filed in said cause a demurrer in words and figures following, to wit:

In the Circuit Court of the United States, Eastern. District of Missouri. Sept. T'm, 1886.

12 JOHN GLENN, Trustee, &c., Plaintiff,
vs.
CHARLES TAUSSIG ET AL. Defendants.

Now come the defendants in the above-entitled cause, by their attorneys, and demur to the amended complaint or petition file herein by plaintiff and to the several causes of action alleged in said complaint for the reasons—

That said amended complaint does not state facts sufficient to constitute a cause or causes of action against these defendants.

That the alleged causes of action stated in said amended complaint accrued more than ten years prior to the commencement of this suit and prior to the date when the non-suit mentioned in said complaint was suffered by plaintiffs.

That the alleged causes of action stated in said amended complaint accrued more than five years prior to the commencement of this suit and prior to the date when the non-suit mentioned in said complaint was suffered by plaintiffs.

That the several causes of action stated in said complaint are barred by the statue of limitations of the State of Missouri.

That the assessment of thirty per cent. upon the stock of the National Express and Transportation Company alleged in the first of said causes of action to have been made by the chancery court of Richmond in December, 1880, and the subsequent assessment of fifty per cent. upon said stock alleged in the second of said causes of action to have been made by the circuit court of Henrico county, Virginia, on March 26th, 1886, are void and of no force or effect as against these defendants; that in the proceedings in which said assessments are alleged to have been made the said courts so making the same had and acquired no jurisdiction over these de-
13 fendants, nor had said courts or either of them jurisdiction therein to make or adjudge any assessment whatsoever against the stock of said National Express and Transportation Company which should be binding upon or furnish any right of action to plaintiff against the stockholders of said company.

BOYLE, ADAMS & McKEIGHAN,
Attorneys for Defendants.

And afterwards, to wit, on the said fourteenth day of December, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
CHARLES TAUSSIG AND MORRIS TAUSSIG, Defendants. } 2673.

14 *Demurrer Sustained.*

Now come the parties, by their attorneys, the plaintiff by T. K. Skinker and the defendants by Boyle, Adams and McKeighan, and by consent the judgment entered herein on November 3rd, 1886, is set aside; and thereupon the plaintiff, by consent, filed amended petition, to which defendants file demurrer, and the court, having considered said demurrer to amended petition, finds the law thereon for the defendants and orders that the same be sustained, and, the plaintiff electing to abide by his said amended petition, it is ordered by the court that judgment be now entered upon said demurrer for defendants.

Judgment.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendants, Charles Taussig and Morris Taussig, go hence without day and have and recover of the said plaintiff, John Glenn, trustee of the National Express and Transportation Company, their costs in this behalf expended, and that a fee bill or execution issue therefor.

Writ of Error Allowed.

And thereupon the plaintiff by attorney presents to the court a writ of error to remove this cause to the Supreme Court of the United States and a citation citing and admonishing the said defendants to be and appear at a Supreme Court of the United States on the first day of the next term thereof to be begun and held at Washington, D. C., on the second Monday of October next; which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

Said appeal bond is in words and figures following, to wit:

15 Know all men by these presents that we, John Glenn, as principal, and James M. Carpenter, as surety, are held and firmly bound unto Charles Taussing and Morris Taussig in the full and just sum of five hundred dollars, to be paid to the said Charles Taussig and Morris Taussig, their heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and sev-

erally, by these presents. Sealed with our seals and dated this 13th day of December, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas lately, at the September term, 1886, of the circuit court of the United States for the eastern district of Missouri, in a suit depending in said court between John Glenn, trustee of the National Express and Transportation Company, plaintiff, and Charles Taussig and Morris Taussig, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said defendants, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said plaintiff shall prosecute said writ to effect and answer all damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JOHN GLENN,
By T. K. SKINKER,
His Attorney. [SEAL.]

JAS. M. CARPENTER. [SEAL.]

Approved by—

SAMUEL TREAT, *Dist. Judge.*

[Endorsed:] No. 2673. United States circuit court, eastern district of Missouri. John Glenn, trustee, *vs.* Charles Taussig *et al.* Bond, $500.00. John Glenn, principal; James M. Carpenter, surety. Filed 14th day of Dec., 1886. A. P. Selby, clerk.

16 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the record and proceedings in case No. 2673, of John Glenn, trustee of the National Express and Transportation Company, plaintiff, against Charles Taussig and Morris Taussig, defendants, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in said district, this second day of February, in the year of our Lord eighteen hundred and eighty-seven.

Seal of the United States Circuit Court, Eastern District of Missouri.

A. P. SELBY,
Clerk of said Court.

[Endorsed:] No. 2673. United States circuit court, eastern district of Missouri. John Glenn, trustee, against Charles Taussig *et al.* Duly certified transcript of the record and proceedings in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 307. John Glenn, trustee of the National Express and Transportation Company, plaintiff in error, *vs.* John J. Taussig and George W. Taussig, executors of Charles Taussig, deceased, and Morris Taussig. Filed March 19, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff in Error,
vs.
JOHN J. TAUSSIG and GEORGE W. TAUSSIG, Executors of Charles Taussig, Deceased, and Morris Taussig. } No. 307.

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

Be it remembered that on the twelfth day of July, A. D. 1886, there was filed in the circuit court of the United States for the eastern district of Missouri a certain petition in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
CHARLES TAUSSIG and MORRIS TAUSSIG, Defendants.

The plaintiff, a citizen of the State of Maryland, complains of the defendants, citizens of the State of Missouri, and who, in the year 1865 and long afterward, with one J. H. Livingston, constituted the firm of Taussig, Livingston & Company, and for cause of action states that in the year 1865 the General Assembly of the State of Virginia passed an act, approved December 12th, 1865, entitled "An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate the National Express and Transportation Company;" that by said act it was, among other things, provided that Joseph E. Johnston and other persons therein named, together with their associates, successors, and assigns, were, and they were declared to be, a body corporate and politic, by the name of the National Express and Transportation Company, sometimes called the National Express Company, for the purpose of an express and transportation business, and as such should have perpetual succession and might sue and be sued, implead and be impleaded, contract and be contracted with; and it was further provided that the capital stock of said company should be $5,000,000

(with the privilege of increasing the same to a sum not exceeding $10,000,000), to be divided into shares of $100 each, and that the principal office of said company should be kept at the city of Richmond, in the State of Virginia.

Plaintiff further states that in the year 1865 defendants, in their said firm name, with many other persons, executed an instrument of subscription to the capital stock of said company in words and figures following:

Subscription List to the Stock of the National Express Company.

We, the undersigned, hereby subscribe the amount and the number of shares opposite our names to the stock of the National Express Company, and bind ourselves, our heirs, &c., to pay said amount in such installments as may be called for by said company, and to pay one per cent. at the time of subscription.

That the number of shares set opposite the name of defendants' said firm in said list was one hundred, and the amount was ten thousand dollars; that defendants became and were the holders of over one hundred shares of stock in said company, and were accepted by said company as such, and that said shares, on the 14th day of December, 1880, and before and ever since that date, have stood on the books of said company in the name of defendants' firm; that by so subscribing and holding said shares defendants agreed and bound themselves, their heirs and legal representatives, to pay to said company, as they should be thereunto required by said company and the president and directors thereof or other lawful authority, the sum of one hundred dollars for each of said shares.

Plaintiff states that said company was duly organized under said act and entered upon the transaction of business, with its principal office in said city of Richmond, and that afterwards, having become embarrassed in its affairs, on the 20th day of September, 1866, said company executed a deed of trust, whereby it granted and conveyed to John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell all its estate, property, rights, and credits of every kind, including all effects and moneys payable to said company, whether on calls or assessments on stock of the company or on notes or otherwise, in trust that the said grantees should collect and dispose of said assets and apply the net proceeds thereof to the payment of the debts of said company.

Plaintiff states that after the execution of said deed one William W. Glenn, a judgment creditor of said company, on behalf of himself and of such other creditors as should choose to be made parties thereto, brought his bill in the chancery court of said city of Richmond, a court of competent jurisdiction, invested by law with all the powers usually possessed by a court of chancery, against the said National Express and Transportation Company and said Hoge, Kelly, and O'Donnell and other persons, officers and directors of said company, the general nature and object of which bill was to cause an account to be taken of the indebtedness of said company to

said William W. Glenn and all its other creditors, to ascertain and settle the validity, scope, and effect of said deed and the powers, duties, and rights of said trustees thereunder, and especially to ascertain and determine whether the unpaid or uncalled stockholders' liability passed by it to said trustees and was to be collected by them, and, if said deed should be held valid, to decree the execution of the trusts thereof; to remove the said trustees and to substitute some other persons or person in the execution of said trusts; to cause a call or assessment to be made upon and against the stockholders of said company, and to authorize and require the said trustees or their successors or successor to collect such assessment from said stockholders; that in said suit process was duly served on said company and on Hoge and Kelly (said O'Donnell having in the meantime departed this life), and said company and said Hoge and Kelly appeared to said suit; that such steps were afterwards taken therein that on the 14th day of December, 1880, a decree was entered in said cause adjudging that under the laws of the State of Virginia said deed of trust was a good and valid conveyance; that its effect was to vest and that it did vest in said original trustees all the estate, property, rights, and credits of said company of every kind and wherever situated or being, including the credits allowed by statute and by said company to its stockholders for the uncalled and unpaid part of the several subscriptions to its capital stock and the right to receive and collect the same according to the terms of the said contracts of subscription; removing said surviving trustees, Hoge and Kelly, from office and in their room and stead appointing the present plaintiff, John Glenn, as sole trustee, clothing him with all the rights and powers and charging him with the execution of the trusts of said deed to the same effect as were the said original trustees, and requiring him to give a bond, with sureties, in the sum of one hundred thousand dollars, for the faithful performance of his duties as such substituted trustee; establishing and allowing the claims of numerous creditors to the amount, including interest, of $509,392.41; finding that $20.00 per share and no more had been called by the board of directors on the stock of said company, and that $80.00 per share remained uncalled; that all calls made by the board of directors had either been exhausted or were then unavailable; that said company had no other assets for the payment of its debts; that the uncalled part of the subscriptions constituted a trust fund in the hands of the stockholders of said company for the benefit of its creditors; that it was necessary that 30 per cent. of said subscriptions should be called in order to meet the expenses of administering said trusts and paying the debts of said company; that said company had long ceased and abandoned its business, and that for about fourteen years there had been no meeting of its stockholders or board of directors; adjudging and making a call upon the stockholders of said company of thirty dollars per share of their stock; requiring said stockholders and each and every one of them and their legal representatives and assigns to pay to this plaintiff the amounts severally due from them under said call, and authorizing and directing this plaintiff to collect said call by suit or otherwise; and plaintiff

states that he accepted said trust, and on the 3d day of January, 1881, qualified by giving bond as required by said decree.

Plaintiff states that by reason of their ownership of stock in said company, as above stated, and by virtue of said decree defendants became and are bound to pay plaintiff the sum of three thousand dollars, with interest from December 14th, 1880, at the rate of six per cent. per annum.

Plaintiff states that in the year 1884 he instituted suit in this court against defendants to enforce this liability; that on the 15th day of July, 1885, plaintiff suffered a nonsuit in said case. Wherefore plaintiff prays judgment against defendants for the sum of three thousand dollars, with interest as aforesaid, and for his costs.

For another cause of action plaintiff states that the suit instituted in the chancery court of the city of Richmond, as aforesaid, was after the 14th day of December, 1880, transferred to the circuit court of the county of Henrico, in the State of Virginia, a court of competent jurisdiction, and that such further steps were therein taken that on the 26th day of March, 1886, a further decree was entered in said cause adjudging that for the payment of a large balance of the indebtedness of said company so established as aforesaid it was necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company and ordering and decreeing that a call and assessment be made, and the same was thereby made, upon the capital stock and the stockholders of said company of fifty dollars on each and every share thereof, and requiring the stockholders of said company and each and every of them and their legal representatives and assigns to pay the several amounts thereby called for to this plaintiff, and authorizing and requiring this plaintiff to collect and receive said call and assessment, and to take such prompt steps toward that end by suit or otherwise and in such jurisdictions as he might be advised.

Plaintiff further states that by reason of their ownership of stock in said company, as hereinabove stated, and by virtue of the decree last mentioned defendants became and are bound to pay to plaintiff the sum of five thousand dollars, with interest from March 26th, 1886, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment for said sum, with interest, and for the costs of this suit.

T. K. SKINKER,
Attorney for Plaintiff.

Upon the filing of said petition there was issued out of the clerk's office of said court a writ of summons, which, with the marshal's return of service endorsed thereon, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon Charles Taussig and Morris Taussig, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for the eastern division of said district, on the third Monday of September next, then and there to answer the complaint of John Glenn, trustee of the National Express and Transportation Company, a citizen of the State of Maryland, as set forth in the petition filed in said court on the twelfth day of July, A. D. eighteen hundred and eighty-six.

Hereof fail not and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the twelfth day of July, A. D. eighteen hundred and eighty-six.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

I hereby certify that I have executed this writ by delivering a true copy of same, with a copy of the complaint thereto attached, to the within-named defendant, Charles Taussig, on the 19th day of July, A. D. 1886, at St. Louis; and I further certify that I have executed this writ by delivering a true copy of same to the within-named defendant, Morris Taussig, on the 12th day of August, A. D. 1886, at St. Louis, in above district.

J. E. D. COUZINS,
U. S. Marshal, Eastern District of Missouri,
By JOHN E. COUZINS, *Deputy.*

And afterwards, to wit, on the twenty-fifth day of September, A. D. 1886, there was filed in said cause a demurrer to the petition in words and figures following, to wit:

(*Demurrer to Petition.*)

In the Circuit Court of the United States, Eastern District of Missouri.
September Term, 1886.

JOHN GLENN, Trustee, &c., Plaintiff,
vs.
CHARLES TAUSSIG *et al.*, Defendants.

Now come the defendants in the above-entitled cause, by their attorneys, and demur to the complaint or petition filed herein by plaintiff and to the several causes of action alleged in said complaint for the reasons—

That said complaint does not state facts sufficient to constitute a cause of action against these defendants.

That the alleged causes of action stated in said complaint accrued more than five years before the commencement of this suit and before the nonsuit mentioned in plaintiff's complaint was suffered.

That the alleged causes of action stated in said complaint are barred by the laches and negligence of plaintiff and of his predecessors in trust.

That the assessment of thirty per cent. upon the stock of the National Express and Transportation Company alleged to have been made by the chancery court of Richmond in December, 1880, and the subsequent assessment of fifty per cent. alleged to have been made by the circuit court of Henrico county, Virginia, on March 26th, 1886, are void and of no force or effect against these defendants; that in the proceedings in which said assessments are alleged to have been made the said courts had and acquired no jurisdiction over these defendants, nor had said courts or either of them jurisdiction therein to make or adjudge assessments against the stockholders of the National Express and Transportation Company.

BOYLE, ADAMS & McKEIGHAN,
Attorneys for Defendants.

And afterwards, to wit, on the twenty-seventh day of September, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

(*Demurrer Submitted.*)

JOHN GLENN, Trustee, Plaintiff,
vs.
CHARLES TAUSSIG *et al.*, Defendants. } 2673.

Now come the parties, by their attorneys, and the demurrer to the petition herein is argued by counsel and submitted, and by the court taken under advisement.

And afterwards, to wit, on the sixteenth day of October, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

(*Demurrer Sustained.*)

JOHN GLENN, Trustee, Plaintiff,
vs.
CHARLES TAUSSIG *et al.*, Defendants. } 2673.

Now come the parties, by their attorneys, and the court, having considered the demurrer to petition heretofore submitted, finds the law thereon for the defendants and orders that said demurrer be, and the same is hereby, sustained.

And afterwards, to wit, on the third day of November, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

(*Judgment on Demurrer.*)

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
CHARLES TAUSSIG *et al.*, Defendants. } 2673.

Now come again the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendants by Boyle, Adams and McKeighan—and, the demurrer to the petition having been heretofore sustained (the court being of opinion that the statute of limitations is a bar to this action) and the plaintiff electing to abide by his said petition, the court orders that judgment be now entered upon said demurrer for defendants.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendants, Charles Taussig and Morris Taussig, go hence without day and have and recover of the plaintiff, John Glenn, trustee of the National Express and Transportation Company, their costs herein expended and have thereof execution.

And thereupon the plaintiff, by attorney and by leave of court, files motion for a new trial.

And afterwards, to wit, on the fourteenth day of December, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff,
vs.
CHARLES TAUSSIG and MORRIS TAUSSIG, Defendants. } 2673.

Now come the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendants by Boyle, Adams and McKeighan—and by consent the judgment entered herein on November 3, 1886, is set aside; and thereupon the plaintiff, by consent, files amended petition, to which defendants file demurrer; and the court, having con-

sidered said demurrer to amended petition, finds the law thereon for the defendants and orders that the same be sustained; and, the plaintiff electing to abide by his said amended petition, it is ordered by the court that judgment be now entered upon said demurrer for defendants.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendants, Charles Taussig and Morris Taussig, go hence without day and have and recover of the plaintiff, John Glenn, trustee of the National Express and Transportation Company, their costs in this behalf expended, and that a fee bill or execution issue therefor.

And thereupon the plaintiff, by attorney, presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendants to be and appear at a Supreme Court of the United States on the first day of the next term thereof, to be begun and held at Washington, D. C., on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

Supreme Court of the United States. October Term, 1889.

JOHN GLENN, Trustee of the National Express and Transportation Company, Plaintiff in Error,
vs.
JOHN J. TAUSSIG and GEORGE W. TAUSSIG, Executors of Charles Taussig, Deceased, and Morris Taussig.
} No. 307.

It is hereby stipulated and agreed that the foregoing record of the circuit court of the United States in and for the eastern district of Missouri shall be treated and considered and have the same effect as if it had been returned to this Court by the clerk of said circuit court in compliance with the writ of certiorari this 21st day of April, A. D. 1890, ordered, and that the said record, together with the record heretofore filed in this case in this Court on the 19th day of March, A. D. 1887, contains and constitutes a true and complete copy of the record and of the assignment of errors and of all proceedings in the case in the said circuit court of the United States in and for the eastern district of Missouri.

April 21, 1890.

CHARLES MARSHALL,
Att'y for Pl'ff in Error.
GEO. W. TAUSSIG,
Att'y for Defendants in Error.

[Endorsed:] Supreme Court U. S. 1889, October term. No. 307. John Glenn, trustee, &c., pl'ff in error, *v.* J. J. Taussig *et al.*, ex'c'rs, &c., *et al.* Stipulation and addition to record.

[Stamped:] Office Supreme Court U. S. Filed Apr. 21, 1890. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED.
APR 30 1890
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

October Term, 1889.

JOHN GLENN, Trustee, &c.,
Plaintiff in Error,

vs.

JOHN E. LIGGETT.

No. 306.

Motion to Dismiss.

And now comes the said defendant in error and moves the court to dismiss this cause for the following reasons:

First. There was never any writ of error issued to the said circuit court to bring up the judgment complained of;

Second. There never was any writ of error returned to or filed in this court, which had been previously directed to the circuit court, to bring up to this court for review the judgment complained of;

Third. This court is without jurisdiction to hear and determine this cause, there having been no writ of error issued or allowed, to bring into this court for review the judgment of the said circuit court herein.

ENOCH TOTTEN,
MASON G. SMITH,
For Defendant in Error.

Brief in support of Motion to dismiss.

Statement of the Case.

On the 12th day of July, 1886, the plaintiff filed his petition in the court below, and on the same day process was issued thereon; this writ was sued out on the 19th of July following.

On the 21st of September, 1886, a demurrer was filed, which was afterwards argued, and on the 3rd day of November, 1886, judgment was rendered in favor of the defendant on the demurrer with costs. (See Supplemental Record.)

On the 13th day of ~~September~~ December, a writ of error was issued, and allowed by the District Judge, to bring the judgment above mentioned into this Court for review. This writ was filed in the court below on the same day, *i. e.*, Dec. 13, 1886. On the same day a citation was signed by the District Judge and filed in the Clerk's office.

On the 14th day of December, 1886, the parties appeared in court and by consent the judgment of November 3, 1886, was by the Court set aside (Original R. 9), and the plaintiff, also by consent, filed an amended petition (Ibid 9 & 3); to this amended petition the defendant demurred and judgment was thereupon, on the same day, *i. e.* the 14th of December, 1886, rendered, on this second demurrer, in favor of the defendant.

There was no writ of error issued or allowed to bring up this last judgment and there was no citation signed as to that judgment.

It is true that the minutes of the Clerk of the Circuit Court recite that the plaintiff's attorney, at the

time of the entry of the second judgment, presented to the court a writ of error to remove the cause to the Supreme Court of the United States, together with a citation, and that the writ was allowed and the citation signed : it is supposed that this entry was intended to refer to the writ which had been filed in the Clerk's office on the previous day. But if there was a second writ sued out and allowed, to bring up this last judgment, it was never returned to or filed in this court, and it is therefore void. But ~~my information is that, in fact,~~ no other writ was sued out.

The Clerk's minutes also recite that at the same time the plaintiff presented his bond and that it was *approved* and ordered to be filed. The bond is set out in full in the record. This bond seems to have been executed by the parties to it, on the 13th day of December, the day before this last judgment was rendered, but it was "approved" (9) and filed (10) in the Clerks office on the day of the date of the last judgment.

Points and Authorities.

This Court can obtain jurisdiction to review a final judgment at law, rendered by a Circuit Court of the United States only upon a writ of error. (R. S. sec. 691).

Sarchet vs. *U. S.* 12 Peters., 143.
Bayard vs. *Lamborn*, 9 How., 530.
Saltmarsh vs. *Tuthill*, 12., 387.
Washington Co. vs. *Durant*, 7 Wall., 690.

The only writ of error in this record was "brought" on the 13th of December, 1886, the day before this judgment was rendered. A writ of error is "brought" when it is filed in the court which rendered the judgment.

Brooks vs. *Norris*, 11 How., 203;
Credit Co. vs. *Ark. R. R. Co.*, 128 U. S., 258.

The judgment rendered on the 3rd of November, 1886, to which the writ of error found in this record was addressed, was set aside at the same term (R. S., Sec. 658,) at which it was rendered. There can be no doubt that the court had full control over its judgments during that term. (*Goddard* vs. *Ordway*, 101 U. S., 745.) Even if it did not possess such control ordinarily, it could set the judgment aside by consent of all the parties to the cause. The bond for the security on this writ of error had not been taken or approved when the first judgment was set aside, and therefore the writ of error had not been perfected. The court having set aside the first judgment (the judgment of November 3, 1886), the writ of error and citation predicated upon it, necessarily became obsolete and inoperative. But even if this were not so, there is no way known to the law by which a writ of error issued and allowed for the purpose of bringing up an existing judgment can be made to apply to another judgment which was not in existence when the writ of errorwas allowed and filed.

No other writ of error having been sued out and no other citation having been signed or served in this case, it must follow that there was and is no writ of

As said before, the clerk's minutes assert (9) that after or at the time the second judgment, that of December 14, 1886, was rendered, a writ of error "to remove *this cause*" was presented to the court and allowed. Even if this were so, and another writ had been issued and allowed as to this new judgment, it could avail the plaintiff in error nothing now, because such a writ has never been returned to this court and the term to which it must have been made returnable has long since passed.

A writ of error must be returned to this court during the term to which it is made returnable. If not so returned it becomes inoperative.

Grigsby vs. *Purcell*, 99 U. S., 505.
Radford vs. *Folsom*, 123 U. S., 725.
Blair vs. *Miller*, 4 Dall., 21.
Castro vs. *U. S.* 3 Wall., 46.
Edmonson vs. *Bloomshire*, 7 Wall., 306.
Foyall vs. *Texas, R. R. Co.* 124 U. S., 519.
Richardson vs. *Green*, 130 U. S., 104.
Hill vs. *Chi. Co.*, 129 U. S., 170.
Norton vs. *Brownsirth*, 129 U. S., 505.

In *Edmonson* vs. *Bloomsville*, (7 Wall., 306), Mr. Justice MILLER, delivering the opinion of the court, said on this subject: "The intelligible ground of this decision is, that the writ of error and the appeal are the foundations of our jurisdiction, without which we have no right to revise the action of the inferior court."

The cause should therefore be dismissed for want of jurisdiction.

ENOCH TOTTEN,

Filed
APR 23 1890
CLERK'S OFFICE

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 306 AND No. 307.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY,
vs.
JOHN E. LIGGETT. — No. 306

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY,
vs.
JOHN J. TAUSSIG AND GEORGE W. TAUSSIG, EXECUTORS OF CHARLES TAUSSIG, DECEASED, AND MORRIS TAUSSIG. — No. 307

ERROR IN EACH CASE TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Brief of Plaintiff in Error.

STATEMENT.

These two cases are alike in all respects. Each was an action of assumpsit brought by John Glenn, trustee of the National Express and Transportation Company, under authority of a decree rendered by the Chancery Court of the city of Richmond, Virginia, on the 14th day of December, 1880, in the case of *W. W. Glenn's Adm'r and Others* v. *The National Express and Transportation Company and Others*, making a call of 30 per cent. on the stockholders of the defendant company; and also under the authority of a decree of the 26th day of March, 1886, rendered in the same case by the Circuit

Court of the county of Henrico, Virginia, (to which court said case had been removed,) making an additional call of 50 per cent. on the said stockholders; and the object of the action in each of the above cases was to recover the amounts of these calls, in No. 306, upon sixty shares of stock held by the defendant in error, and in No. 307 on one hundred shares held by the defendants in error.

The declaration in each case fully states the grounds of the plaintiff's claim, pp. 3–7, the paging in the two records being the same. A demurrer was interposed to the declaration in each case (p. 8). The demurrer was sustained in each case, and judgment entered for the defendants in error (p. 9). The writ of error in each case is to such judgment.

POINTS.

The causes of demurrer assigned in each case are the same, and seem to embrace only—

(1) Various statutes of limitation.

(2) Want of jurisdiction in the Virginia court to render the decrees of call.

These and all other questions arising or sought to be raised upon the face of the declaration by the demurrer have been adjudicated by numerous courts upon similar demurrers or upon special pleas, and, with the exception of the said Circuit Court of the United States for the Eastern District of Missouri, have been uniformly decided in favor of the plaintiff in error. It is sufficient to cite—

Glenn, Trustee, v. *Williams*, 60 Md., 93.

Glenn, Trustee, v. *Semple*, 80 Ala., 380.

Vanderwerken v. *Glenn, Trustee*, 13 Va. Law Journal, 305, s. c. 6 S. E. R., 806.

Lewis's Adm'r v. *Glenn, Trustee*, 84 Va., 947; s. c. 6 S. E. R., 866.

Hambleton v. *Glenn, Trustee*, 13 Va. Law Journal, p. 242: s. c. 8 S. E. R., 129.

Hawkins v. *Glenn, Trustee*, 131 U. S., decided at the last term of this court.

(1) Under these decisions, as no statute of limitations began to run until a judicial call was made, and the action in each case was brought within five years after the call, the period of the shortest limitation, the demurrer in each case should have been overruled on that ground; if, indeed, in a common law action, the defence of limitations can be made by demurrer to the declaration.

Cheming Canal Bank v. *Lowery*, 93 U. S., 73.

(2) In respect to the defence of want of jurisdiction in the Virginia court to render the said decrees of call, the declaration shows that the creditors secured by the deed of trust, and the company, and the trustees in the deed, were all before the court, and, being a court of chancery of competent jurisdiction in other respects, its jurisdiction to render the decrees of call was also established by said decisions, in the absence of stockholders as individual parties, who, being represented by the company, are held to have been neither necessary nor proper parties for the purposes of the suit.

It is plain, therefore, that the judgment of the Circuit Court for the Eastern District of Missouri, in each of the above cases, must be reversed, with costs.

CHARLES MARSHALL,
JOHN HOWARD,
Counsel for the Plaintiff in Error.

November 21, 1889.

Addendum to the Foregoing Brief.

When the foregoing brief was filed, it was understood and assumed that the grounds relied upon by the defendants in error for the pleas of limitations would be the same in this court as were relied upon in the court below, and were sustained by that court in three separate hearings of these cases, as reported successively in

Glenn v. *Dorsheimer*, 23 Fed., 695.
Glenn v. *Leggett*, 23 Fed., 695.
Glenn v. *Taussing*, 23 Fed., 695.
Same v. *Same*, 24 Fed., 536.
Same v. *Same*, 28 Fed., 907.

But quite recently it was discovered that, as the records appeared in this court, another and very different ground of limitation might be considered as arising.

The two calls or assessments sought to be enforced in each action were made by decrees of the Richmond court, of date respectively Dec. 14, 1880, and March 26, 1886. This action in each case was brought after the latter date, but precisely when does not appear by the record, the amended petition being the first pleading noted. This was filed Dec. 14, 1886, just six years after the date of the first call. The five year statute of limitations is pleaded by the demurrer, and also the ten-year statute. With a view of showing that the five-year statute is no bar, the petition pleads that an action was brought to recover the amount of the first call in 1884, and plaintiff suffered a non-suit therein on the 15th day of July, 1885. Under section 6784, Rev. Stat., Mo., 1889, a new action brought *before the 15th day of July*, 1886, would be in time.

This section reads as follows:

"If any action shall have been commenced within the times respectively prescribed in this chapter, and the plaintiff therein suffer a non suit, or, after a verdict for him, the judgment be arrested, or, after a judgment for him, the same be reversed on appeal or error, such plaintiff may commence a new action, from time to time, within one year after such non-suit suffered, or such judgment arrested or reversed; and if the cause of action survive or descend to his heirs, or survive to his executors or administrators, they may, in like manner, commence a new action within the time herein allowed to such plaintiff; or, if no executor or administrator be qualified, then within one year after letters testamentary or of administration shall have been granted to him."

The court might perhaps well infer that the original petition in the present action was filed *before* the 15th day of July, 1886.

But, if this inference should be deemed inadmissible, it is submitted—

1. That the five-year statute is no bar to the action, so far as concerns the call, if the period runs from the date of the call, and not from any earlier time, as has been held in *Hawkins* v. *Glenn*, 131 U. S., 319.

Inasmuch, therefore, as the demurrer challenged both counts of the petition, and was sustained as to both, there is error requiring reversal of the judgment, even if the court could not see from the record that the error related to the first count as well as the second.

But, on application of the plaintiff in error, the court, on the 21st inst., ordered *a certiorari* to bring up the rest of the record, and, by stipulation of counsel, the record in each case has been made complete. (See additional part and stipulation at page 8.)

Thus corrected, each record now shows that the new action in it was brought on the 12th day of July, 1886, and was thus brought in time under said section 6784 of Revised Statutes of Missouri 1889, which is a mere re-enactment of the law as it stood in July, 1886.

But we submit –

2. That five years is not the period applicable to this case.

The Missouri statutes of limitations, (revision of 1889,) so far as they need be set out, are as follows:

"Section 6773. Civil actions, other than those for the recovery of real property, can only be commenced within the periods prescribed in the following sections, after the causes of action shall have accrued.

"Section 6774. Within ten years: *First, an action upon any writing, whether sealed or unsealed, for the payment of money* or property; second, actions brought on any covenant of warranty contained in any deed of conveyance of land shall be brought within ten years next after there shall have been a final decision against the title of the covenanter in such deed, and actions on any covenant of seizin contained in any such deed shall be brought within ten years after the cause of such action shall accrue; *third, actions for relief, not herein otherwise provided for.*

"Section 6775. Within five years: *First, all actions upon contracts, obligations, or liabilities,* express or *implied,* except those mentioned in section 6774, and except upon *judgments and decrees of a court of record,* and except where a different time is herein limited; second, an action upon a liability created by a statute other than a penalty or forfeiture; third, an action for trespass on real estate; fourth, an action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property, or for any other injury to the person or rights of another, not arising on contract, and not herein otherwise enumerated; fifth, an action for relief on the ground of fraud, the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud."

"Section 6796. *Every judgment, order, and decree of*

any court of record of the United States, or of *this or any other State* or Territory, shall be presumed to be paid and satisfied after the expiration of *twenty years* from the day of the rendition of such judgment or order of decree; but in any suit in which the party against whom such judgment, order, or decree was rendered, or his heirs or personal representatives shall be a party, such presumption may be repelled by proof of payment or written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by such judgment, order, or decree; in all other cases it shall be conclusive."

The petition avers that the defendants "subscribed" for a number of shares of the capital stock of the company, and "thereby agreed to be liable to the company, and undertook and promised to pay to the company for each and every share so subscribed by defendants the sum of one hundred dollars."

The word "subscribe" imports a promise in writing.

Webster's Dictionary—Title, Subscribe.
Worcester, *Ib.*
Bonvier—Title, Subscription.

The averments of the petition, therefore, are equivalent to a statement that defendants promised in writing to pay the amount of their stock.

Such a promise comes within the first sub-division of section 6774, and the period of limitation is ten years.

Moorman v. *Sharp*, 35 Mo., 283.
Reyburn v. *Casey*, 29 Mo., 129.

In addition to the foregoing averments, the petition also states that the stock was to be paid "in such instalments and at such times as said defendants might be lawfully called upon and required to pay the same, according to the legal tenor and effect of the laws under which said company was incorporated, and said subscription to said stock made by defendants."

The laws referred to are the following:

Code of Va., 1860, chapter 57, p. 331, section 3: "Upon every subscription for shares in any joint stock company (except banks of circulation), there shall be paid upon each share two dollars at the time of subscribing, and the residue thereof as required by the president and directors."

"Section 21. If the money which any shareholder has to pay upon his shares be not paid as required by the president and directors, the same, with interest thereon, may be recovered by warrant, action, or motion; or such shares may, after notice in a newspaper for one month of the time and place of sale, be sold," &c.

The petition then shows that the president and directors failed to call in more than 20 per cent. of the stock, and that subsequently, on the 14th of December, 1880, the Richmond court, by decree, ordered the call.

In other words, the petition shows that the promise to pay was in writing, and that the amount to be paid was to be ascertained by some subsequent procedure, and was ascertained by the call. In such cases the limitation is ten years

Carr v. *Thompson*, 67 Mo., 472.

On the other hand, if the present action could be considered as founded on the call, that having been made by a decree of a court of record, twenty years would be the period of limitation under section 6796, *supra*.

Or, if plaintiff's right of action be considered as a composite one, founded in part upon the subscription paper and in part upon the decree, then the case would be one of those "actions for relief not herein otherwise provided for," embraced in the third sub-division of section 6774, and the period of limitation would be ten years.

If the petition showed defendant to be a purchaser of stock, and not an original subscriber, then, perhaps, his liability would be one of those "contracts, obligations, or liabilities implied," the limitation of which, under section 6775, is five years.

But since this does not appear, the period must be either ten years or twenty, which is immaterial, and this action is therefore brought in time, under the decision in the *Hawkins Case*, and numerous other decisions to the same effect cited in that case by the court and by the counsel for Glenn.

CHARLES MARSHALL,
JOHN HOWARD,
Counsel for Plaintiff in Error.

April 25, 1890.

Office Supreme Court U. S.
FILED
MAY 2 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1889.

JOHN GLENN, TRUSTEE, &c.,
Plaintiff in Error,

vs.

JOHN E. LIGGETT.

No. 306.

BRIEF OF PLAINTIFF IN ERROR ON MOTION TO DISMISS.

It is submitted that it appears sufficiently by the Record, that the writ of error and the citation have reference to the judgment of the 14th December 1886, and that the citation and writ are erroneously dated.

The Record returned under *certiorari*, shows that on the 3d of November 1886, the day the judgment on the demurrer to the original declaration was rendered, the plaintiff filed a motion for a new trial, (page 7, new part of Record,) the judgment being on demurrer, and the motion being in effect a motion for a rehearing.

While that motion was pending, on the 14th of December, the parties came into Court by their attorneys, and by agreement the judgment of November 3d was struck out; in other words, the motion for a new trial or rehearing was substantially granted.

There was thus on the 13th no case for a writ of error. The motion for a new trial had not been disposed of. Had the writ of error been granted on the 13th of December, it is plain that the motion for a new trial must first have been overruled. As it was not, and as it stood open up to the time the judgment was rendered on the 14th, it is manifest that the writ of error must relate to the judgment of that date.

This is confirmed by the fact that the bond, though also dated on the 13th of December, was not approved until the 14th, (old Record, pages 9 and 10,) nor does the order allowing the writ of error appear until the 14th. Hence it is fair to infer, as every intendment ought to be made in favor of the Record, that the date of the writ of error and of the citation is a clerical error, and that the one was granted and the other issued on the 14th of December.

As counsel for motion refer to their information, we will state that we have received to-day, April 30th, the following explanation, by telegraph, from Thomas K. Skinker of St. Louis, who tried the case below:

"Original Record, also transcript, sent you," (meaning transcript used in the application for *certiorari*), "show writ of error allowed December 14th. No entry in the case December 13th 1881. Record of 14th is signed by Judge Treat, who also signed writ. I dated bond, and as I recollect, writ, December 13th, and exhibited them to the Court same day, but owing to absence of opposing counsel, who had orally consented to setting aside former judgment and filing amended petition, no action was taken until the 14th when they were present. Amended petition was filed and writ was allowed and signed."

This explanation accords fully with what is indicated by the Record itself.

The Court's attention is also called to the stipulation attached to the new record, page 8. It is there agreed by counsel "that the new, together with the old, part of the

record, contains and constitutes a complete copy of the record, and of the assignment of errors and of all proceedings in the case in the said Circuit Court, &c."

It will be seen that the new part of the record states in terms that the writ of error was taken out to the judgment of the 14th December, (see page 7, new record) and the stipulation admits this to be true, and unless the citation refers to *this* writ of error, we should have this remarkable state of affairs—a citation referring to the original judgment of November 3d without any writ of error, and a writ of error referring to the judgment of December 14th without any citation.

This strange incongruity and absurdity is avoided, and the whole record made regular and complete by the obvious suggestion that the date of the writ and of the citation was an oversight and mistake, and that the real date of the granting of the writ and the issuing of the citation was the 14th of December, as the record (old part page 9 and new page 7 alike) recites.

The case is not distinguishable from *O'Dowd vs. Russell*, 14 Wall, 405, in which the judgment was rendered on the 31st of October, 1871, and a writ of error was issued on the 10th of November, 1871, but bore date the 16th of October, 1871, fifteen days before the rendition of the judgment. This Court said, by the Chief Justice, that the date of the writ was "an obvious mistake," and that it "did not vitiate the writ."

In this case the writ was duly returned to this Court, and service of the citation was acknowledged by the counsel for the defendant in error, and they have appeared and argued the case by brief and orally on the merits; and they admit that there was but one writ of error, and the Record shows that that writ was allowed, and the bond approved and filed, on the 14th day of

December, 1886, the date of the only existing judgment now or at that time.

The mistake of a day in the date of the writ should not be allowed to defeat the ends of justice.

CHARLES MARSHALL,

JOHN HOWARD,

For Plaintiff in Error.

April 30, 1890.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 306.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN E. LIGGETT.

T. K. SKINKER,
Attorney for Plaintiff.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 306.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN E. LIGGETT.

To the Honorable the Supreme Court of the United States:

The plaintiff in error respectfully represents that he instituted this suit in the circuit court of the United States for the eastern district of Missouri by filing his original petition therein on the 12th day of July, 1886; that on the same day the clerk of said court issued a summons herein for the defendant; that on the 19th day of July, 1886, said summons was served upon defendant by the marshal of said district, who on the 26th day of July, 1886, made return of said service; that on the 21st day of September, 1886, the defendant filed a demurrer to said original petition, and the court, on the 16th day of October, 1886, entered an order sustaining the same; that on the 14th day of December, 1886, the plaintiff, by leave of court, filed an amended petition herein; that in making up the transcript herein the clerk of said court omitted all mention of the proceedings prior to said amended petition and inserted only the said amended petition and the subsequent proceedings; that by his demurrer to the said

amended petition the defendant pleads the five-year statute of limitations against the causes of action sued on, and it is necessary to the proper determination of this case that the Court shall be advised when it was instituted. Plaintiff annexes hereto copies of the said original petition, summons, return, demurrer to the original petition, and order sustaining the same, as follows:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } ss:

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

Be it remembered that on the twelfth day of July, A. D. 1886, there was filed in the circuit court of the United States for the eastern district of Missouri a certain petition in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, } ss:

In the Circuit Court.

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
JOHN E. LIGGETT, *Defendant.*

The plaintiff, a citizen of the State of Maryland, complains of the defendant, a citizen of the State of Missouri, and for cause of action states that in the year 1865 the General Assembly of the State of Virginia passed an act, approved December 12th, 1865, entitled "An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate the National Express and Transportation Company;" that by said act it was, among other things, provided that Joseph E. Johnston

and other persons therein named, together with their associates, successors, and assigns, were, and they were declared to be, a body corporate and politic, by the name of the National Express and Transportation Company, sometimes called the National Express Company, for the purpose of an express and transportation business, and as such should have perpetual succession and might sue and be sued, implead and be impleaded, contract and be contracted with; and it was further provided that the capital stock of said company should be $5,000,000 (with the privilege of increasing the same to a sum not exceeding $10,000,000), to be divided into shares of $100 each, and that the principal office of said company should be kept at the city of Richmond, in the State of Virginia. Plaintiff further states that in the year 1865 defendant became and was the holder by assignment of sixty-three shares of stock in said company, and was accepted by said company as such, and that said shares, on the 14th day of December, 1880, and before and ever since that date, have stood on the books of said company in the name of defendant; that by so subscribing and holding said shares defendant agreed and bound himself, his heirs and legal representatives, to pay to said company, as he or they should be thereunto required by said company and the president and directors thereof or other lawful authority, the sum of one hundred dollars for each of said shares.

Plaintiff states that said company was duly organized under said act and entered upon the transaction of business, with its principal office in said city of Richmond, and that afterwards, having become embarrassed in its affairs, on the 20th day of September, 1866, said company executed a deed of trust, whereby it granted and conveyed to John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell all its estate, property, rights, and credits of every kind, including all effects and moneys payable to said company, whether on calls or assessments on stock of the company or on notes or

otherwise, in trust that the said grantees should collect and dispose of said assets and apply the net proceeds thereof to the payment of the debts of said company.

Plaintiff states that after the execution of said deed one William W. Glenn, a judgment creditor of said company, on behalf of himself and of such other creditors as should choose to be made parties thereto, brought his bill in the chancery court of said city of Richmond, a court of competent jurisdiction, invested by law with all the powers usually possessed by a court of chancery, against the said National Express and Transportation Company and said Hoge, Kelly, and O'Donnell and other persons, officers and directors of said company, the general nature and object of which bill was to cause an account to be taken of the indebtedness of said company to said William W. Glenn and all its other creditors, to ascertain and settle the validity, scope, and effect of said deed and the powers, duties, and rights of said trustees thereunder, and especially to ascertain and determine whether the unpaid or uncalled stockholders' liability passed by it to said trustees and was to be collected by them, and, if said deed should be held valid, to decree the execution of the trusts thereof; to remove the said trustees and to substitute some other persons or person in the execution of said trusts; to cause a call or assessment to be made upon and against the stockholders of said company, and to authorize and require the said trustees or their successors or successor to collect such assessment from said stockholders; that in said suit process was duly served on said company and on Hoge and Kelly (said O'Donnell having in the meantime departed this life), and said company and said Hoge and Kelly appeared to said suit; that such steps were afterwards taken therein that on the 14th day of December, 1880, a decree was entered in said cause adjudging that under the laws of the State of Virginia said deed of trust was a good and valid conveyance; that its effect was to vest and that it did vest in said original trustees all the estate, property, rights,

and credits of said company of every kind and wherever situated or being, including the credits allowed by statute and by said company to its stockholders for the uncalled and unpaid part of the several subscriptions to its capital stock and the right to receive and collect the same according to the terms of said contracts of subscription; removing said surviving trustees, Hoge and Kelly, from office and in their room and stead appointing the present plaintiff, John Glenn, as sole trustee, clothing him with all the rights and powers, and charging him with the execution of the trusts of said deed to the same effect as were the said original trustees, and requiring him to give a bond, with sureties, in the sum of one hundred thousand dollars, for the faithful performance of his duties as such substituted trustee; establishing and allowing the claims of numerous creditors to the amount, including interest, of $509,392.41; finding that $20.00 per share and no more had been called by the board of directors on the stock of said company, and that $80.00 per share remained uncalled; that all calls made by the board of directors had either been exhausted or were then unavailable; that said company had no other assets for the payment of its debts; that the uncalled part of the subscriptions constituted a trust fund in the hands of the stockholders of said company for the benefit of its creditors; that it was necessary that 30 per cent. of said subscriptions should be called in order to meet the expenses of administering said trusts and paying the debts of said company; that said company had long ceased and abandoned its business, and that for about fourteen years there had been no meeting of its stockholders or board of directors; adjudging and making a call upon the stockholders of said company of thirty dollars per share of their stock; requiring said stockholders and each and every one of them and their legal representatives and assigns to pay to this plaintiff the amounts severally due from them under said call, and authorizing and directing this plaintiff to collect said call by suit or otherwise; and plain-

tiff states that he accepted said trust, and on the 3d day of January, 1881, qualified by giving bond as required by said decree.

Plaintiff states that by reason of defendant's ownership of stock in said company, as above stated, and by virtue of said decree he became and is bound to pay plaintiff the sum of eighteen hundred and ninety dollars, with interest from December 14th, 1880, at the rate of six per cent. per annum.

Plaintiff states that in the year 1884 he instituted suit in this court against defendant to enforce this liability; that on the 15th day of July, 1885, plaintiff suffered a nonsuit in said case. Wherefore plaintiff prays judgment against defendant for the sum of eighteen hundred and ninety dollars, with interest as aforesaid, and for his costs.

For another cause of action plaintiff states that the suit instituted in the chancery court of the city of Richmond, as aforesaid, was after the 14th day of December, 1880, transferred to the circuit court of the county of Henrico, in the State of Virginia, a court of competent jurisdiction, and that such further steps were therein taken that on the 26th day of March, 1886, a further decree was entered in said cause adjudging that for the payment of a large balance of the indebtedness of said company so established as aforesaid it was necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company and ordering and decreeing that a call and assessment be made, and the same was thereby made, upon the capital stock and the stockholders of said company of fifty dollars on each and every share thereof, and requiring the stockholders of said company and each and every of them and their legal representatives and assigns to pay the several amounts thereby called for to this plaintiff, and authorizing and requiring this plaintiff to collect and receive said call and assessment, and to take such prompt steps toward that end by suit or otherwise and in such jurisdiction as he might be advised.

Plaintiff further states that by reason of defendant's ownership of stock in said company, as hereinabove stated, and by virtue of the decree last mentioned he became and is bound to pay to plaintiff the sum of thirty-one hundred and fifty dollars, with interest from March 26th, 1886, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment for said sum, with interest, and for the costs of this suit.

T. K. SKINKER,
Attorney for Plaintiff.

Upon the filing of said petition there was issued out of the clerk's office of said court a writ of summons, which, with the marshal's return of service endorsed thereon, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon John E. Liggett, a citizen of the State of Missouri, that he be and appear before the honorable circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for the eastern division of said district, on the third Monday of September next, then and there to answer the complaint of John Glenn, trustee of the National Express and Transportation Company, a citizen of the State of Maryland, as set forth in the

petition filed in said court on the twelfth day of July, A. D. eighteen hundred and eighty-six.

Hereof fail not and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 12th day of July, A. D. eighteen hundred and eighty-six.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *sct:*

I hereby certify that I have executed this writ by delivering a true copy of said writ, with a copy of the complaint thereto attached, to the within-named defendant, John E. Liggett, on the 19th day of July, A. D. 1886, at St. Louis, in above district.

J. E. D. COUZINS,
U. S. Marshal, Eastern District of Missouri,
By JOHN E. COUZINS, *Deputy.*

And afterwards, to wit, on the twenty-first day of September, A. D. 1886, there was filed in said cause a demurrer to the petition in words and figures following, to wit:

Demurrer to Petition.

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States within and for said District.

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
JOHN E. LIGGETT, *Defendant.*

Now comes John E. Liggett, the above-named defendant,

and demurs to the petition of plaintiff in this cause, and for grounds of demurrer states—

First. That said petition does not state facts sufficient to constitute any cause or causes of action against this defendant.

Second. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within ten years next before the commencement of this suit.

Third. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the second count of said petition at any time within ten years next before the commencement of this suit.

Fourth. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within five years next before the commencement of this suit.

Fifth. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the second count of said petition at any time within five years next before the commencement of this suit.

Sixth. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within ten years next before the commencement of the suit in which plaintiff alleges that he suffered a nonsuit.

Seventh. That it appears upon the face of said petition that no cause of action accrued to plaintiff by reason of any of the matters or facts set forth in the first count of said petition at any time within five years next before the commencement of the suit in which plaintiff alleges he suffered a nonsuit.

Eighth. That it appears upon the face of said petition that both of the pretended causes of action attempted to be set forth in said petition are barred by the statute of limitations of the State of Missouri.

SMITH & HARRISON,
Attorneys for Defendant.

And afterwards, to wit, on the twenty-seventh day of September, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

(*Demurrer Submitted.*)

JOHN GLENN, *Trustee, Plaintiff,*
vs.
JOHN E. LIGGETT, *Defendant.* } 2674.

Now come the parties, by their attorneys, and the demurrer to the petition herein is argued by counsel and submitted, and by the court taken under advisement.

And afterwards, to wit, on the sixteenth day of October, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

(*Demurrer Sustained.*)

JOHN GLENN, *Trustee, Plaintiff,*
vs.
JOHN E. LIGGETT, *Defendant.* } 2674.

Now come the parties, by their attorneys, and the court,

having considered the demurrer to petition heretofore submitted, finds the law thereon for the defendant and orders that said demurrer be, and the same is hereby, sustained.

And afterwards, to wit, on the third day of November, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

Judgment on Demurrer.

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
JOHN E. LIGGETT, *Defendant.* } 2674.

Now again come the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendant by Smith and Harrison—and, the demurrer to the petition having been heretofore sustained (the court being of opinion that the statute of limitations is a bar to this action) and the plaintiff electing to abide by his said petition, the court orders that judgment be now entered upon said demurrer for defendant.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, John E. Liggett, go hence without day and have and recover of the plaintiff, John Glenn, trustee of the National Express and Transportation Company, his costs herein expended, and have thereof execution.

And thereupon the plaintiff, by attorney and by leave of court, files motion for a new trial.

And afterwards, to wit, on the fourteenth day of December, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
JOHN E. LIGGETT, *Defendant.*
2674.

Now come the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendant by Smith and Harrison—and by consent the judgment entered herein on November 3, 1886, is set aside; and thereupon the plaintiff, by consent, files amended petition, to which defendant files demurrer; and the court, having considered said demurrer to amended petition, finds the law thereon for the defendant and orders that the same be sustained; and, the plaintiff electing to abide by his said amended petition, it is ordered by the court that judgment be now entered upon said demurrer for defendant.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendant, John E. Liggett, go hence without day and have and recover of the said plaintiff, John Glenn, trustee of the National Express and Transportation Company, his costs in this behalf expended, and that a fee bill or execution issue therefor.

And thereupon the plaintiff, by attorney, presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendant to be and appear at a Supreme Court of the United States on the first day of the next term thereof, to be begun and held at Washington, D. C., on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

UNITED STATES OF AMERICA.
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the pleadings and proceedings prior to the 14th day of December, A. D. 1886, when an amended petition was filed, as appears of record, and also the order of December 14th, 1886, permitting said amended petition to be filed in case No. 2674, of John Glenn, trustee of the National Express and Transportation Company, plaintiff, against John E. Liggett, defendant, being the same case in which a writ of error was sued out on December 14, 1886, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this ninth day of April, in the year of our Lord eighteen hundred and ninety.

[SEAL.]

A. P. SELBY,
Clerk of said Court.

Wherefore plaintiff prays the Court to cause its writ of certiorari to be issued to the clerk of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, requiring him forthwith to return unto this Court, under his hand and the seal of said court, true copies of the said original petition, summons, return, demurrer to the original petition, and order sustaining said demurrer.

JOHN GLENN,
Trustee of the Nat'l Express and Transportation Company.

In the Supreme Court of the United States.

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff in Error,*
vs.
JOHN E. LIGGETT, *Defendant in Error.*

DISTRICT OF MARYLAND, *sct:*

I, James W. Chew, clerk of the circuit court of the United States in and for the district of Maryland, do certify that on this 12th day of April, A. D. 1890, personally appeared before me, in the city of Baltimore, in the district aforesaid, John Glenn, the person named in the foregoing petition and motion, and made oath in due form of law that the matters and things stated in said petition and motion are true to the best of his knowledge and belief; and the said John Glenn did further make oath that he was not informed of the omission and neglect of the clerk of the circuit court of the United States for the eastern district of Missouri to transmit a full and complete transcript of the record of the proceedings of the said circuit court in this case to this Court until after the printing of the record in this Court; and he did further make oath and depose that the actual question intended to be brought before this Court by the writ of error in this case was not whether this suit was instituted within the time prescribed by the statute of limitations of the State of Missouri after the rendition of the decree of the chancery court of the city of Richmond referred to in the record, but whether the cause of action in this case did not in fact arise before the said decree; and deponent further made oath that, the record in this Court being sufficient to present to this Court the question as to whether the statute of limitations began to run from the date of said decree or before said decree, and that having been in fact the question passed upon by the circuit court, the attention of this deponent was diverted

from the fact that by the error of the clerk of the circuit court of the United States for the eastern district of Missouri in omitting to transmit a complete copy of the record of the case to this Court the record in this Court is made to present the question which was not in fact presented or tried in the court below—that is to say, the question whether this suit was brought within the time prescribed by the laws of Missouri after the date of the decree aforesaid. Deponent further made oath, as aforesaid, that his attention to the imperfect condition of the record in this Court was further diverted by the fact that the actual question intended to be brought before this Court in this case was brought before the Court in the case of this deponent *vs.* Hawkins, reported in 132 U. S., and that by leave of Court counsel from Missouri was permitted to appear and argue the said case of Hawkins, because, as was alleged, the issue in that case as to the time when the statute of limitations would begin to run was the same as in this case and another case from the Missouri circuit pending in this Court. This deponent was thereby led to assume that the record in this case sufficiently presented the real question intended to be brought before this Court by the writ of error, and his attention was diverted from the fact that the incompleteness of the record raised another question that did not exist in fact and was not passed upon by the circuit court.

Deponent further made oath that as soon as his attention was called to the imperfection of the record he took measures to have the same remedied without delay, and he says that if this Court shall grant his petition the return to the writ of certiorari will be made in full time to have the complete record of the case in this Court before the case is called for argument.

And further this deponent saith not.

JOHN GLENN, *Trustee.*

Subscribed and sworn before me this 12th day of April, 1890.

In testimony whereof I have hereto set my name and affixed the seal of said court.

[SEAL.] JAMES W. CHEW,
Clerk of said Court.

Supreme Court of the United States.

OCTOBER TERM, 1888.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY,

Plaintiff in Error,

vs.

JOHN E. LIGGETT,

Defendant in Error.

No. 306.

STATEMENT, POINTS AND AUTHORITIES AND ARGUMENT OF DEFENDANT IN ERROR.

ENOCH TOTTEN,
MASON G. SMITH,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY,

Plaintiff in Error,

vs.

JOHN E. LIGGETT,

Defendant in Error.

No. 306.

STATEMENT OF DEFENDANT IN ERROR.

This action originated in the Circuit Court of the United States, for the Eastern District of Missouri. The petition contains two counts, and seeks a recovery of amounts alleged to be due from defendant to plaintiff, as assignee of the National Express and Transportation Company, by virtue of two assessments ordered by a court of equity in the State of Virginia, against the stockholders of said company, including defendant.

The first assessment of thirty dollars a share bears date December 14, 1880, and the second assessment of fifty dollars a share bears date March 26, 1886. Briefly stated, the facts as gleaned from this record are, that in December, 1865, the said company was incorporated under the laws of Virginia. Its existence was brief, for within a year it ceased to exist, having, on September 20, 1866, made a general assignment for the benefit of its creditors; since which time it has ceased to do any business or exercise any corporate function. This assignment authorized the assignees to collect all the debts, claims and moneys payable, to reduce the same to money, and for this and other purposes to employ "agents, clerks, counsel, attorneys and servants."

That the defendant, at some time which is not stated, subscribed for sixty-three shares of the company's stock, of the par value of $100 each, and undertook to pay for said shares when he might be lawfully called upon and required to pay the same, "according to the legal tenor and effect of the laws under which the company was incorporated, and said subscription to said stock made by the defendant." This barren statement is all that the record shows as to the said laws and the terms of said subscription. From the date of the assignment in September, 1866, nothing whatever was done by the assignees, nor by the creditors of the defunct company, until November, 1871. No effort was made by them during said period of time to collect any of the debts and claims owned by the company.

In November, 1871, one W. W. Glenn, a judgment creditor, filed a bill in the Chancery Court of the City of Richmond, Va., in his own behalf, and in behalf of all other creditors of the company, against the company "and certain of its officers," and against said assignees, seeking to obtain a judicial determination of the validity of the deed of assignment, and a judicial construction of said deed, and to enforce the trusts thereby declared in favor

of the creditors of the company. This suit lay dormant till the year 1879. Glenn, in the mean time, departed this life. In 1879 the suit was revived in the name of Glenn's administrator. After revivor, an amended bill was filed against the company, "certain of its officers," and such of the assignees as were then alive.

This amended bill sought the additional relief of an account and establishment of the debts due by the company and an account of the property and estate subject to the terms of said deed of assignment, including the amount of capital stock unpaid and uncalled for by the company; to remove the surviving trustees and to appoint a new one in their stead, and to procure an assessment or call to be made by said court upon the uncalled and unpaid capital stock, and the persons liable to pay the same.

No stockholder or director of the company was made a party to said original or amended bill.

On the 14th day of December, 1880, a decree was entered in that suit, decreeing, among other things, the removal of said surviving assignees and appointing plaintiff in their stead; ascertaining that the debts of the company amounted to $509,392.41, and decreeing that a call and assessment upon the stock and stockholders of thirty dollars a share payable to the plaintiff be made.

So matters rested till the year 1884, when plaintiff instituted a suit against defendant in the court below to recover the amount of said assessment made in December, 1880.

In July, 1885, the plaintiff suffered a nonsuit in said action. On the 14th of December, 1886, he filed an amended petition (Pr. Rec., 2-7), the first count of which covers the said first assessment of thirty per cent., and the second count covering the further assessment made in 1886 of fifty dollars per share. The first and only record as to the

time of the commencement of this suit is the filing of the said amended petition on December 14, 1886. On that day a demurrer was filed by defendant to said amended petition.

First. A general demurrer to both counts, that the amended petition did not state facts sufficient to constitute a cause of action.

Second. The Missouri statute of limitations.

Third. That the Chancery Court of Richmond had no jurisdiction to make the assessments alleged, and that they were void.

POINTS.

I.

It is settled practice in Missouri that the defense of the statute of limitations may be made by demurrer, when the petition upon its face shows that the time has elapsed within which the suit may be brought.

State v. Bird, 22 Mo. 470.
Boyce v. Christy, 47 Mo. 70.
Henoch v. Chaney, 61 Mo. 129.
State ex rel. Matney v. Spencer, 79 Mo. 314.

II.

The Transportation Company executed a general deed of assignment on the 20th day of September, 1866. By its terms the assignees were empowered to collect all the debts of said company and reduce the same to money. The corporation from said date ceased to do any business, and became practically dissolved. From this on no creditor of the corporation moved until November, 1871, when

the original bill of complaint was filed in the Richmond court by W. W. Glenn. That action remained dormant till 1879, when the administrator of Glenn (who had died) on the 14th day of December, 1880, obtained a decree therein.

No steps were taken to enforce the assessment ordered by said decree until the year 1884. During the time between September 20, 1866, the date of the deed of assignment, and November, 1871, the commencement of the Richmond suit, no impediment was in the way of the creditors of the corporation to proceed. They did nothing for more than five years, when a single creditor, although nominally on behalf of others, commenced the suit in Richmond, and nothing whatever was done in said suit for nine years thereafter; and the said suit did not terminate until after the expiration of more than fourteen years from the date of the assignment in 1866.

In such circumstances defendant contends that the cause of action was barred by the statute of limitations of Missouri, by which actions on contracts, obligations or liabilities, such as the one before the court, were and are limited to five years.

Revised Statutes of Missouri, 1879, Sec. 3230, Chap. 48.

Revised Statutes of Missouri, 1889, Sec. 6775, Chap. 103.

III.

It is averred in the amended petition that the unpaid balance of defendant's subscription was to be paid by him to the company as and when the same should be required to be paid, according to the terms of the subscription therefor, and the laws of the State of Virginia applicable

to said contracts of subscription (Pr. Rec. p. 4). This created an obligation payable on demand.

Goshen Turnpike Co. v. Hurtin, 9 Johnson, 217.
Howland v. Edmonds, 24 N. Y. 310.
Stillwell v. Craig, 58 Mo. Rep. 24-31.
Upton v. Tribilcock, 91 U. S. 45.

IV.

In case of ordinary obligations to pay money on demand, no actual demand would be necessary to set the statute in motion; but the cause of action would accrue, and the statute begin running immediately.

Angel on Limitations (6th Ed.), pp. 93, 94 and 95.
2 Daniel on Neg. Inst. Sec. 1215.
McMullen v. Rafferty, 89 N. Y. 485.
Easton v. McAllister, 1 Mo. Rep. (side), 662.
Codman v. Rogers, 10 Pick. 119.
Andreas' Appeal, 11 W. Notes Cases, 294 (Sup. Court Pa. 1882).

As between the company and the stockholder, while the company is a "going concern," the above rule would not probably apply, and the statute would not begin running in such case until actual call or demand in some form had been made.

V.

But where, as here, the corporation has made a general assignment for the benefit of its creditors, with power in the assignees to collect in and reduce the debts and assets to money, and the corporation thereby ceased to be a going concern, but was practically dissolved and dead, the obligation to pay unpaid balances of stock, which before the

assignment and cesser of business was conditional, became unconditional and fixed, and in such case the creditor can at once proceed against the stockholders.

Ogilvie v. Insurance Co., 22 How. 380.
Shockley v. Fisher, 75 Mo. 501-502.
Eppright v. Nickerson, 78 Mo. 448.
Garesche v. Lewis, 93 Mo. 179; 15 Mo. App. R. 565.

VI.

As between the creditors of an insolvent corporation and the stockholders, the unpaid stock is a debt due at once without further demand: and to entitle them to collect it in equity no making of a call by directors or by a court is necessary.

Henry et al. v. Vermillion & A. R. R. Co. et al. 17 Ohio, 187.
Hatch v. Dana, 101 U. S. 205.
Marsh v. Burroughs, 1 Woods, 464.
Holmes v. Sherwood, 16 Fed. Rep. 725.
Crawford v. Rohrer, 59 Md. 600.
In re Glen Iron Works Bkpt., 20 Fed. Rep. 674.
Sagory v. Dubois, 3 Sandford Ch. 466, 492.

VII.

Where a corporation has made a general assignment of all its property and thus disabled itself from the performance of its ordinary functions, and has ceased to do any business and to all intents and purposes is dissolved and dead, there is no sound legal reason why a creditor may not at once proceed at law as in equity against stockholders; and in cases at law at the Missouri circuit (*Glenn v. Dorsheimer, 23 Fed. Rep. 696; Glenn v. Dorsheimer, 24 Fed. Rep. 536, and Glenn v. Priest, 28 Fed. Rep.*

908), the court held (Judges Brewer and Treat both concurring) that the creditor could have proceeded at once after the assignment and cesser of business in 1866, and the running of the statute commenced at once.

VIII.

The courts of Missouri, in construing a statute of limitations of that State, hold, for the purposes of such statute, that the liability of a stockholder to a creditor of a corporation becomes fixed by the insolvency and dissolution of the corporation, and then becomes a primary and unconditional obligation, and the statute commences to run at once.

Garesche v. Lewis, 93 Mo. Rep. 197 (affirming same case, 15 Mo. Appeal Reports, 565).

And the courts of Missouri further hold that the "dissolution," for the purpose of a proceeding against the stockholders, occurs and exists, when the corporation becomes insolvent and assigns its property for the benefit of its creditors and ceases from doing any act manifesting an intention to resume its corporate functions.

State Savings Association v. Kellogg, 52 Mo. Rep. 583.

Moore v. Whitcomb, 48 Mo. 543.

Slee v. Bloom, 19 J. R. 456.

IX.

In view of the peculiar facts and circumstances of this case, and in view of the averment that the original subscription was made to the corporation; that the said subscription and the right to collect it were duly assigned to and vested in strangers; that the company disbanded and

was practically dissolved and ceased to exist after the assignment; and that neither the directors or stockholders of said company were made parties to said suit, the ruling here ought to be that said decree does not bind this defendant for want of jurisdiction as to him and the other stockholders.

X.

Under the laws of Virginia, by virtue of which the company was incorporated, the balance remaining unpaid on stock subscriptions was payable as called for or required by the "president and directors of the company."

It is alleged in the amended petition (Pr. Rec., p. 3) that defendant promised to pay the company in installments as he might be lawfully called upon and requested to pay them, according to the laws under which the company was incorporated, that is, on the call or request of the president and directors. Neither the president nor either of the directors or stockholders was a party to said Richmond suit, and the defendant was a non-resident of Virginia.

It is alleged that "certain of the officers" of the company were parties to that suit; and that when decree was rendered "certain of its officers" had been summoned, but as to what officers were such parties and so summoned the record is silent.

The allegation that certain officers were made parties and summoned will not be taken to be an allegation that the president and directors were such parties and so summoned.

The president and directors were the agents to make the calls, and as none of them were before the court, the assessment made by the court could not have bound them, and could have no binding force against the stockholders, whom they represented. The emasculated corporation,

which, fourteen years before, had sold everything it had, including all stock subscriptions, represented nothing, and for all functional and essential purposes was as effectually dissolved as if a solemn judgment of a court had been pronounced to that effect. Hence, the amended petition does not state facts sufficient to constitute a cause of action, but also shows, upon its face, that the Richmond court had no jurisdiction to make the assessment or call.

ARGUMENT.

The plaintiff was barred by the statute of limitations.

As actions on contract, such as the one before the court, by the statutes of Missouri (cited in Point No. 2), were and are limited to five (5) years from the accruing of the cause of action, and as this was one clearly on contract, it was undoubtedly barred, unless the right accrued within five years prior to November 14, 1886, the date of filing the amended petition in the court below.

The right or wrong of the ruling as to this depends, then, on the question of when the cause of action accrued. Was it in December, 1880, when the plaintiff was appointed trustee in the deed of assignment in place of the original trustees, and was ordered by the Virginia court to collect thirty per cent. of the unpaid stock subscriptions? Or was it fourteen years earlier, and more than twenty years before the amended petition was filed, when, in September, 1866, the original trustees were appointed by the president and directors; were vested with the title to all of the unpaid subscriptions; and, were, in effect, directed to collect all thereof without unnecessary delay?

Or, if not at either of these times, was it yet at the expiration only of a reasonable time after the assignment to

the trustees in 1866, within which they with proper diligence might have caused a call for the unpaid subscription to be made?

The ~~defendant~~ plaintiff in error insists that it was at the first named period. We contend that it was either at the second, or, at the furthest, at the third; and if at either of these two, that then the action was barred.

In determining when it did accrue, it must first be borne in mind, that the plaintiff in the action is only the substitute of the original trustees, and is no better position than they. He takes his title from them and stands in their shoes. If they would have been barred, so also is he.

Next it must be considered what was the nature of the defendant's obligation as a stockholder, out of which the cause of action arose, and how, with reference to the accruing of that cause, it was affected by the assignment to the trustees. If its nature was such as that the sum subscribed was payable at certain fixed times, in named installments, then it is plain that no cause of action could accrue upon it, for the several installments, until the arrival of the times so fixed for their payment respectively. Or, if it was such, as that the sum was payable only in case it was needed to pay losses and expenses of the company, and to the extent and when the president and directors of the company might determine it to be so needed, then also the accruing of it would depend upon the existence of such losses and expenses, and the arising of a need for its payment to meet them, as well as upon its being determined by the president and directors that it was so needed. So, again, if it were such as that the sum was to become payable, only, if a majority of the stockholders of the company by vote instruct the directors to call upon the subscriber to pay it, then, too, it would seem that no cause of action would accrue till, by such vote, the instruction should be given.

But if, on the other hand, the nature of the obligation was such as that the time for payment of the sum subscribed, or any installment of it, was not definitely fixed; or as that no condition of there having been losses or expenses making it necessary for it to be paid, as well as a determination of the directors that such necessity existed was required for the making it to be payable; or, as that no prior vote of stockholders was made a condition precedent to its becoming due; if nothing in the nature of a condition was annexed to it, except a provision that the time or times of the payment of the sum promised or any part of it, should be such as should be fixed by the company or its president and directors, "calling for" it, or "requiring" it, then the determination of the time of the accruing of a cause of action upon it, we submit, depends upon quite different considerations. In the case of one thus payable, as "called for," or "required," by the company or its managers, while the time of its maturity would be uncertain, yet it is evident that in every respect, except the time of maturity, it would be unconditional and absolute; and, as to that even, it also would be capable of being made certain at any time, by the mere exercise by the company, or its managers, of their volition to have it made so. Such an obligation, we submit, cannot be held to be a conditional one, except in the sense that every obligation payable on the demand of the obligee is so. Indeed, such a one is, in effect, but one payable on demand. To "call for," or to "require," is but to "demand, to ask as of right and by authority."

And that the power of making the requisition is lodged in the "president and directors," and not in the general body of the company, can make no difference as to this. They are its managing body, through whom it acts, and by whom alone in the great mass of its transactions its will is expressed. And the power is one, the exercise of which,

upon application by the company, or its creditors, or representatives, they would have no right to refuse.

That the obligation to pay money subscribed to the stock of corporations as "called for," or "required," by the president and directors, is but that of a debt payable on demand, has been several times decided.

Thus, in Goshen Turnpike Co. v. Hurtin, 9 Johns. 217, it was held as to a note given to a corporation "for five shares of stock of the company, and payable at such time and in such proportion as the president and directors should require," "that it was payable absolutely, and not depending on any contingency; and was, in effect, payable on demand." And the opinion was concurred in by all the members of the court, of whom Chancellor Kent was then the Chief.

In Howland v. Edmunds, 24 N. Y. 310, in an action upon a note given to an insurance company, in which the maker promised to pay $580 "in such portions and at such times as the directors might require," it was held the note was payable on demand, could be sued on at once, and that limitation ran upon it from its date. In a very able opinion by Denio, J., it was said of the note, "it was payable on request, which the law construes to mean immediately, if such be the pleasure of the holder. The directors, whose determination as to the time of payment is mentioned in the note, were, as the governing power of the corporation, the holder of the paper; and the statement that the money should be payable at such times as they might require, was in effect a provision that it should be paid on the demand of the payees."

In Stillwell v. Craig, 58 Mo. 24-31, it was held that a note expressed to be for value received in a certificate for ten shares of stock of a company, and payable in "installments not to exceed ten per cent. on each share at thirty days' notice of call from the board of directors," was not

so uncertain as to time of payment as to make it a non-negotiable note; and it was said by the court, that, in the element of certainty of time of payment, no difference was perceived in principle between such a note and one payable on demand. In Upton v. Tribilcock, 91 U. S. 45, it was said of a certificate of stock issued to defendant, by which it was stated that the holder was entitled to 100 shares of $100 each, payable as to twenty per cent. in four installments of five per cent. at fixed times, and the time and manner of the payment of the residue not specified; but such residue, alleged in the complaint to have been payable as called for by the company, and the certificate stamped non-assessable, that "the legal effect of the instrument was to make the remaining eighty per cent. payable upon the demand of the company."

Thus, then, there is ample authority for the view, if any were needed, that the obligation of a subscription to stock, payable as "called for" by the president and directors of a company, is that of a contract to pay on demand. And if the contract of the defendant in this action was merely to pay the sum subscribed at times and in amounts as called for, or required, by the president and directors, then, in determining when a cause of action upon it arose, we may properly regard its obligation as being that of one due on demand, and may apply to it whatever rules or principles are applied to such obligations, with reference to the bar of limitation. But, upon examination of the record, that is just what we find the contract to have been, such being the effect of the allegations of the amended petition, and if the directors had demanded the whole of it the next day after the subscription he would have been bound in law to pay it. It was *debitum in præsenti, solvendum in futuro;* the uncertain future to be made certain, whenever the president and directors willed it.

But, taking it as true that the obligation of the defendant as to the unpaid balance, was that of a promise to pay on demand only, at what time would a cause of action accrue upon it? Would an actual demand, a "calling for," or "requiring" of it, or some part of it, be necessary to set the statute in motion? Or would the cause of action accrue immediately, and without any actual demand, and the statute start at once?

Judged by the rule governing ordinary obligations for the payment of money on demand, the answer would be that no actual demand would be necessary to set the statute in motion, but that a cause of action would accrue, and the statute begin running immediately. Such is the well settled rule as to notes payable on demand, and also as to other money obligations.

See authorities cited under Point No. 4

And, looking merely to the form of the contract, and ignoring the *quasi*-confidential relation—growing out of a common interest—that exists between the corporate body and its members, there is no apparent reason why the rule should not apply to the obligation to pay a stock subscription on demand, as well as to any other. But for that relation, and taking the actual language of the contract as the index of its legal effect, it would seem to be capable of being sued upon at once, without demand.

Inasmuch, however, as the relationship between the company and the stockholders is such as that it may be presumed that the adverse interest, which exists between the ordinary creditor and his debtor, is qualified by it; and that, therefore, there is an implication that the money subscribed to be paid on demand is in fact not to become payable at once, but is, by consent of the creditor, to be retained by the debtor until an actual demand is made for it, it is not unreasonable to believe that as to such obligations

the ordinary rule does not apply; that as to them, as between the company and the stockholder—the intention is that there shall be an actual demand before there is a right of action; and that the mere bringing the action itself shall not be a sufficient demand.

But, however this may be, it is obvious that after the corporation has transferred the debt to a stranger, as between whom and the stockholder there is no intimacy of relation, feeling or interest, as against whom he is as much interested to resist the claim as he would be the holder of any other kind of obligation made by him—then no reason exists for not applying the general rule governing the right of action on debts payable on demand. From the time of the assignment of the debt, there is no ground to infer that the debtor designs, or the creditor expects, that the sum promised shall be retained by the debtor until the creditor actually demands it. From then on the reason of the thing would seem to require that the debt should be held to be immediately due, and the statute, as in the case of others payable on demand, to begin to run at once. Especially would this be so where the assignment was to an assignee for creditors for the expressed and distinct purpose of collecting the debt. As against him there could not be the slightest inference of an intent to indulge the debtor, but just the contrary.

And this view is in line with the now well settled doctrine that, as between the creditors of an insolvent corporation and the stockholders, the unpaid stock is a debt due at once, without further demand; and that, to entitle them to collect it in equity, no making of a call either by directors or by a court is essential.

See authorities cited in Point No. 6.

In Henry v. Vermillion, etc. R. R., 17 Ohio, 187, it was said: "When a company * * * becoming insolvent abandon all action under their charter, the original

mode of making calls upon the stockholders cannot be pursued. *The debt, therefore, from that time must be treated as due without further demand.*"

It was in line with the view in this case, and others argued with it, that Judges Brewer and Treat sustained demurrers to the several petitions.

Glenn v. Dorsheimer *et al.*, 23 Fed. Rep. 696.
Glenn v. Dorsheimer *et al.*, 24 Fed. Rep. 536.
Glenn v. Priest *et al.*, 28 Fed. Rep. 908.

Speaking of the nature of the obligation and the effeet upon it of the assignment, it was there said (23 Fed. Rep. 606):

Brewer, J. "The obligation in the first instance is a conditional obligation. The stockholders are not to pay until a call has been made. As was suggested in the argument, these debts due by the stockholders to the corporation are its assets and furnish its means for transacting business, and, so long as the corporation is a 'going concern,' doing business, it may not need to have those obligations called in; and so, while it is a 'going concern,' I tnink it is fair to say, as is said by the Supreme Court of Mississippi" (referring to Payne v. Bullard, 23 Miss. 88-91), "that theirs is a conditional obligation, and while the corporation continues to transact business, whether 5, 15 or 50 years, the stockholder's liability continues, and becomes absolute only after a call is made. But that is not this case, and the court in Mississippi draws the distinction very nicely. In 1866 this corporation ceased to do business; it ceased to be a going concern. It turned over its property, including the debts due from its stockholders, to the assignees to collect its debts, dispose of its property and pay its creditors. Whenever such a cessation of business occurs, it seems to me fair to say that the liability of

the stockholders becomes absolute — a fixed unconditional obligation."

Thompson on Stockh., Sec. 291.
Payne v. Bullard, 23 Miss. 91.
Terry v. Anderson, 95 U. S. 636.

If the distinction suggested above, and maintained in the opinion quoted from, is a just one, then a cause of action for the whole of the unpaid part of the stock subscribed by the plaintiff in error accrued to the trustees in the deed of assignment of 1866, upon the making of that deed, without any demand; and the statute of limitations began to run then, and the suit against him was barred long before it was begun.

But, even if that distinction is not well taken, and we think it is, and if we assume that after the assignment some demand of some sort was necessary to be made, before there would be technically a right of action for the debt, can yet the demand be made at any period of time—no matter how remote—and till so made will the statute in no instance begin to run? Can the healthful benefit of a statute of repose be defeated by the failure of the creditor during years of delay to do that which alone is necessary to complete his right of action? May the assignee defer making, or having made, a demand, or call, for the debt, until witnesses have died, papers and records been lost and the memory of facts which would have constituted a defense become obliterated; and then, making it, deny the benefit of the statute to the defendant on the ground that no cause of action had accrued before? In this case no call was made until nearly three times the period, counting from the assignment, that would have barred the claim. If a call may be delayed that long, why may it not be delayed a century as well? If it may, it is clear that there is a grave defect in the law.

But we are not willing to concede the existence of such defect. We submit that upon principle, and the authority of a number of adjudicated cases by several of the most respectable courts of last resort in this country, the beneficient operation of the statute could not be stayed during the long period between the assignment of 1866 and the decree of 1880, by the mere neglect of the assignee to make a call or demand.

In such a case, at least, the principle applicable to ordinary cases of contracts to deliver property on demand, or to pay money so many days after demand, or to any others, the nature and terms of which show that the making of an actual demand was intended as a condition precedent to a right of action, will govern. In the case of such contracts, the principle is that the right of the creditor to make the demand, or do any other act necessary to be done in order to give him a complete cause of action, is itself limited to a reasonable time; and after the lapse of such a time for the exercise of the right, the statute will begin to run, whether the act was in fact done or not. What is the measure of such reasonable time depends on the circumstances of each case; but in the absence of good reasons to the contrary, it will by analogy be fixed within the period by which the right of action, if demand had already been made, would have been barred. Measured by that rule, some call or demand should have been made by the trustees, or procured by them to be made by the directors, or a court within five years after the assignment of 1866. If so made and followed by an action within five years after its making, the right of action thereon would not have been barred. But not having been so made, the right to make it ceased at the end of five years, and from that time, at least, the statute began to run, and the action was barred more than ten years before November, 1886. Or, if five years should be thought to be an unreasonably short time for the trustees to cause the call to be made,

then at the end of such other time as was reasonable, say six, or even nine, years, the right would cease and the statute begin to run.

This principle is noted by Mr. Angell in his work on Limitations (6th ed.) at p. 95, § 96; and it is more especially announced, and applied, in the following cases, viz.:

Codman v. Rogers, 10 Pick. 119 (1830).
Baker v. Atlas Bank, 9 Met. 198 (1845).
Laforge v. Jayne, 9 Pa. St. 410 (1848).
Pittsb. & C. R. R. Co. v. Byers, 32 Pa. St. 22 (1858).
Pittsb. & C. R. R. Co. v. Graham, 36 Pa. St. 77 (1860).
Morrison's Admr. v. Mullin, 34 Pa. St. 12, 17 (1859).
Shackamaxon Bank v. Disston, 20 W. N. C. 297 (1887).
Franklin Savgs. Bank v. Bridges, 20 Id. 43 (1887).
Baker v. Johnson County, 33 Iowa, 154 (1871).
Prescott v. Gosner, 34 Iowa, 187 (1872).
Hintraeger v. Hennessy, 46 Iowa, 600 (1877).
First Nat. Bank v. Greene's Estate, 64 Iowa, 445 (1884).
Palmer v. Palmer, 36 Mich. 488 (1877).
Wright v. Paine, Admr., 62 Ala. 340 (1878).

The doctrine of these cases we submit is a sound and reasonable one, and ought to be followed.

Surely it ought not to be allowed to a creditor who has a claim payable on demand, to postpone the maturity of it indefinitely, by its mere neglect, or refusal, to make the demand. The less does it seem that it ought to be allowed so to do, where, as here, he was a trustee for the creditors of an insolvent corporation, vested with the title to the

claim for the express purpose, declared in the deed, of collecting it, and when, as the representative of the creditors, he could, soon after his appointment, have sued the plaintiff in error directly by bill in equity without the necessity of a call.

Hatch v. Dana, 101 U. S. 205.
Ogilvie v. Knox Ins. Co., 22 How. 380.

The right to bring such suit in equity had become barred long before the institution of this suit at law, but yet by means of the roundabout proceedings taken in Virginia, it is claimed that a right of action at law has been kept alive. That the direct and simple remedy in equity should be dead, and an indirect remedy, at law, be found alive after all these years, presents an anomaly in jurisprudence whose very existence is a persuasive argument, that the right of action at law is barred also. In view of it, it is not strange that in his last opinion, delivered in the cases brought by Mr. Glenn in Missouri, Judge Brewer, said: (28 Fed. Rep. 908.)

"*I cannot escape the conviction, that no mere strategy of legal proceedings should enable a party to jump the lengthened space of eighteen years and destroy the beneficent effect of a statute of repose like the statute of limitations.*"

Or that he, in his first opinion, in them (23 Fed. Rep. 699) said that he did not think, that where the creditor in the first instance had an open, ordinary, direct and simple way of collecting his debt, he might follow any other way that he saw fit, and say, that although the statute of limitations would have cut off the simple and direct way, *yet it did not happen to interfere with the various steps pursued in the way around*, to reach the stockholder.

That our jurisprudence ought not to be marred by such an anomaly, as the endowing the liability of the stockhold-

ers of insolvent corporations for corporate debts with immorality in courts of law, and yet limiting it to the usual periods of limitation after the company's insolvency in courts of equity, all will admit. And, if such is the law, it is plain that it ought not to be so. The application of the principle laid down in the cases from which we have quoted, will go far to remove the difference in the operation of the statute in the two systems of procedure.

And we respectfully submit that Scoville v. Thayer, 105 U. S., relied on by ~~defendant~~ plaintiff here as decisive, will be found on examination not so.

Assuming that the principle established by the cases we have cited is held to be sound, the facts abundantly warrant its application. The trustees, under whom Glenn derives his right, could easily have done all that was done by the creditors in 1879–1880, towards having a call made—if any was necessary—as early as 1867 or 1868; and have gotten a decree ordering it in eighteen months after 1866, or earlier. The creditors, after they began to proceed actively in 1879, obtained a decree within eighteen months.

But instead the trustees did nothing at all, began no suits, either against the stockholder directly in equity, or against the company and directors to have a call made. It does not appear a demand even was ever made by them. Nor were the creditors much more diligent even if their activity could be credited to the trustees. They delayed more than five years before even filing a bill. And when it was filed they did not sue out process against the company for nearly eight years more. In the summer of 1879 only did they proceed with their suit. Till then it was left to sleep. Finally, in 1880, the removal of the trustees was secured and a call ordered by the court. Nearly three times the statutory period in Missouri for bringing suit had then expired since the assignment to the trustees. Under the principle of the cases cited by us a delay of less than half

this time to make demand was enough to set the statute in motion.

Even if it were held that the unreasonable delay of the trustees in having a call made by the directors, or the court, did not set the statute in motion, yet we submit that it began to run at the time of the deed of assignment in 1866, because that deed was itself a sufficient call for all the unpaid stock, and the amended petition avers that defendant assented and agreed to the assignment, and agreed to pay the balance unpaid.

"A call is nothing more than an official declaration that the sums subscribed are required to be paid. And a direction to collect such sums necessarily involves such a declaration."

Braddock v. P. M. R. R. Co., 45 N. J. L. 364.

And a resolution directing the president to "take such proceedings toward the collection of subscrptions as would most speedily accomplish the object," was under the above definition held by the Supreme Court of New Jersey in 1883 to be a call. *Idem.*

And a mere demand by the assignee for creditors is held in Pennsylvania a sufficient call.

Yeager v. Scranton Tr. Co., 14 W. N. C. 296.

And in Missouri an assignment of all property of a corporation, where the stock by the provisions of statute was payable as called for by directors, was held to convey uncalled subscriptions, and to give the assignee the right to sue for them.

Shockley v. Fisher, 75 Mo. 501, 502.
1 Rev. Stats. 1879 of Missouri, § 738.
Eppright v. Nickerson, 78 Mo. 488.

We take the position that this corporation, when it passed and conveyed all its property and assets, including

the subscriptions for stock, and all other property, by a general assignment for the benefit of its creditors, was dissolved as to creditors. (*Slee v. Bloom, 19 J. R. 456.*) We take the further position that there is a vital difference between a corporation so circumstanced, lifeless and dead to all intents and purposes, and a living, "going" corporation. In the one case the corporation, being pennniless and insolvent, ceases all business and is practically out of existence. All its assets will be speedily needed to pay its debts. It is known by the very act of assignment that they will be so needed, no matter in what form they may exist. Before the assignment it would not be known whether unpaid balances on stock subscriptions would be needed and called or not, but after the insolvency it is generally certain that they will be needed to pay the debts of the insolvent. It is just these circumstances—the insolvency and dissolution of the corporation—that should change the well-known rule relating to "going concerns." In the one case the contract of subscription is conditional, in the other that contract becomes fixed and unconditional. In the one case the cause of action accrues after a call or request to pay is made, in the other the cause of action accrues immediately on the insolvency and dissolution of the corporation.

In Missouri with reference to a local statute of limitations, these views have certainly been held (*Garesche v. Lewis, 93 Mo. 197*), and they are in harmony with the general course of decisions in that State; and it is the doctrine of that State, in a line with *Slee v. Bloom, 19 J. R. 456, supra*, that a general assignment by a corporation and total cesser of business amounts to a dissolution of the corporation as to creditors. Not in the sense that a judicial decree would dissolve it, but in the sense that the creditor can then proceed untrammeled, freed from any embarrassment (*State Savings Association v. Kellogg, 52 Mo. 583*). And we call the attention of the court to these decisions in Missouri, in reference to their own statute of limita-

tions, and especially those which hold that on the assignment by and such consequent dissolution of a corporation in that State, the statute of limitations begins to run on the stockholder's liability at once. But, in any view, these creditors, as soon as the deed of assessment was made, and the corporation became moribund, had an open, direct, simple and ample remedy for collecting their debts from stockholders. That remedy could have been used immediately whether the technical fact of a call existed or not. It was neglected, and a circuitous proceeding adopted to which the stockholders were not parties, the result of which is fairly illustrated in this case, more than twenty years having elapsed since said assignment of the filing of the amended petition in December, 1886. If this shall be approved, then the statute of limitations looses its quality of repose, and there is no limit, within which the assignees of a dead corporation may cease to vex and harrass the living and their descendents. When questioned, they have only to reply, "See the Magic of a Call."

In the year 1884 suit was first instituted in the court below to enforce the same supposed liability as that covered by the first count of the amended petition; that liability was for the first assessment of thirty per cent. made in 1880. On the 15th day of July, 1885, the plaintiff suffered a nonsuit in that action (Pr. Rec., p. 7). By the statutes of Missouri, § 6784; R. S. 1889, ch. 103, § 3239; R. S. 1879, ch. 48 (then and now in force), it is provided that "if any action shall have been commenced within the times respectively prescribed in this chapter" (ch. 103, R. S. 1889; ch. 48, R. S. 1879), "and the plaintiff therein suffer a nonsuit, * * * such plaintiff may commence a new action from time to time within one year after such nonsuit suffered." After suffering said nonsuit the plaintiff commenced this action, and the first count of the amended petition is the same cause of action in which he so suffered a nonsuit in July, 1885 (Pr. Rec., pp. 2–7). The record shows that

to the first count of the amended petition a demurrer was taken by defendant, on the ground of the bar of the statute of limitations. The record shows that the amended petition was filed below on December 14, 1886, nearly six years after the cause of action on that count accrued. There is nothing in the record showing when the original petition was filed, and there is, therefore, nothing in the record showing error in sustaining the plea of the statutory bar of five years. The judgment will be presumed to be correct, unless a showing of manifest error is made. No such error appearing, the judgment should be affirmed on this ground.

ENOCH TOTTEN,
MASON G. SMITH,
Counsel for Defendant in Error.

Office Supreme Court U. S.
FILED.
APR 30 1890
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1889.

JOHN GLENN, Trustee.

vs.

JOHN E. LIGGETT.

No. 306.

Supplemental Brief for Defendant in Error.

The defendant submits for the consideration of the Court the following points in addition to those stated in the original brief, to-wit:

First. The judgment on the demurrer to the amended petition in favor of the defendant was right, because the chancery court of Richmond and the Circuit Court of Henrico County were without jurisdiction to make a valid decree or order in the premises, as against the defendant, for the want of necessary parties.

Second. The alleged decree of December 14, 1880, (3), was a final decree which disposed of the whole subject matter of the cause before the court, and there being no reservation, by the decree, holding the cause open for further proceedings, the subsequent call or assessment alleged have been made by the circuit court of Henrico County was void.

Third. The alleged transfer of the cause from the chancery court of Richmond to the circuit court of

Henrico County does not appear to have been made in pursuance of any general or special statute, and there is no averment that the latter court ever had jurisdiction of the parties or of the subject matter of the suit.

I.

The amended petition contains the allegation that the chancery court of Richmond decreed that by the term of the contract between the company and the stockholders, the latter could be lawfully called upon and required to pay assessment on such stock as they might be required by "said company *through its president and board of directors*," and there is no averment that the "President and board of directors," or any of them, were parties to that cause and there is no explanation or reason given for not making them parties. The only allegation in this direction is that "certain of its officers" were made parties (R., 4). This is not enough. These officers might have been inferior and irresponsible officers. Among the causes of demurrer are these: That the petition "does not state facts sufficient to constitute any cause of action, or causes of action," (8), and that "the chancery court of Richmond had no jurisdiction to make the assessment alleged."

It therefore appears, so far as the plaintiff in error is concerned, that the defendant in error became a part of the corporation, and that according to the terms of the contract between the corporation and the stockholders the latter could be bound only *by the president and board of directors.* They are the *legal representatives* of the stockholders. These officers were, therefore, clearly necessary par-

ties to enable the chancery court of Richmond and the circuit court for the County of Henrico to make a valid and binding decree as to stockholders.

It is, perhaps, true that in ordinary cases it is sufficient to sue the corporation alone for the purpose of collecting assessments due from its stockholders. But where particular officers are named by law, as the persons authorized and required to make call for assessments on stockholders, it should seem clear that they are indispensible parties to a proceeding instituted in behalf of creditors to enforce the making and collecting of such assessments. These officers are naturally the persons to respond to such a suit, and the only competent persons to answer as to why such assessments had not previously been made and collected. They are the lawfully constituted representatives of the stockholders, and are created such in lieu of the corporation itself. This view seems to be held by the Supreme Court of Appeals of Virginia. In the case of *Lewis* vs. *Glenn*, (84 Va.), cited by this court in *Hawkins* vs. *Glenn*, (113 U. S., 33), that court used the following language:

> "The suit of *Glenn* vs. *The National Express and Transportation Company* is a creditor's suit against a corporation, and, by the terms of its charter and the laws of this State applicable to said company, it was lawfully sued as such by its corporate name, and the individual stockholders were not proper parties to such a suit, *the president and directors being by their selection their representatives for this purpose.*"

II.

The first count of the amended declaration alleges that the Richmond Chancery Court, in the suit of *Glenn* vs. *The Transportation Company*, made a final decree, marshaling the debts of the company, and ordering and adjudging that a call or assessment of 30 per cent. on the capital stock and stockholders of the company be made to pay such debts

There is nothing in the record showing that the court reserved to the creditors liberty to move that court to make any further or other assessment or call; nor was there any reservation in said decree for any purpose, but it was as to every matter embraced in the suit, a final decree. The powers of the court in the cause without such reservation, ended with that assessment.

The second count alleges that after said decree the Richmond suit was "transferred" to the Circuit Court of Henrico County, Virginia, which is alleged to be a court of competent jurisdiction, and that such further steps were taken in that court that on March 26th, 1886, *another decree* was entered by that court, ordering and decreeing that a further call or assessment of fifty per cent. be made upon the stockholders of the company, and that the same was thereby made.

The decree of the Richmond chancery court having been final and the powers of that court over the subject-matter having been exhausted, the Henrico Circuit Court had no power or jurisdiction to make any other or further decree in the same suit and hence the demurrer was well taken to the second count or cause of action. (See Rec., p. 7.)

III.

So far as the case made by the amended petition of the plaintiff goes, the alleged transfer of the cause from the Chancery Court of Richmond to the Circuit Court of Henrico County was wholly without authority and unauthorized by any statute. Argument is not needed to sustain the assertion that such a transfer cannot be made without the aid of some statutory authority. There is some reason to suppose that the Chancery Court of Richmond is a local court established by some special law, but there is no averment nor is there anything to indicate that the Circuit Court of Henrico County had jurisdiction in Chancery causes; its name would indicate the contrary if anything. There is not even an averment that the latter court ever legally obtained jurisdiction of the cause.

This objection was presented to the court by the last ground of demurrer (9.)

MASON G. SMITH,
ENOCH TOTTEN,
For Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 307.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN J. TAUSSIG AND GEORGE W. TAUSSIG, EXECUTORS OF CHARLES TAUSSIG, DECEASED, AND MORRIS TAUSSIG.

T. K. SKINKER,
Attorney for Plaintiff.

JUDD & DETWEILER, PRINTERS.

Supreme Court of the United States.

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No. 307.

JOHN GLENN, TRUSTEE OF THE NATIONAL EXPRESS AND TRANSPORTATION COMPANY, PLAINTIFF IN ERROR,

vs.

JOHN J. TAUSSIG AND GEORGE W. TAUSSIG, EXECUTORS OF CHARLES TAUSSIG, DECEASED, AND MORRIS TAUSSIG.

To the Honorable the Supreme Court of the United States:

The plaintiff in error respectfully represents that he instituted this suit in the circuit court of the United States for the eastern district of Missouri by filing his original petition therein on the 12th day of July, 1886; that on the same day the clerk of the said court issued a summons herein for the defendants; that on the 19th day of July, 1886, said summons was served upon the defendant, Charles Taussig, and on the 12th day of August, 1886, upon the defendant, Morris Taussig, by the marshal of said district, who on the 15th day of August, 1886, made return of said service; that on the 25th day of September, 1886, the said defendants filed a demurrer to said original petition, and the court, on the 16th day of October, 1886, entered an order sustaining the said demurrer; that on the 14th day of December, 1886, the plaintiff, by leave of court, filed an amended petition herein; that in making

up the transcript herein the clerk of said court omitted all mention of the proceedings prior to the said amended petition and inserted only the said amended petition and the subsequent proceedings; that by their demurrer to the said amended petition the said defendants pleaded the five-year statute of limitations against the causes of action sued on, and it is necessary to the proper determination of this case that the Court shall be advised when it was instituted. Plaintiff annexes hereto copies of the said original petition, summons, return, demurrer to the original petition, and order sustaining the same, as follows:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern Judicial District of Missouri, } *ss:*

In the Circuit Court of the United States in and for the Eastern Division of said Judicial District.

Be it remembered that on the twelfth day of July, A. D. 1886, there was filed in the circuit court of the United States for the eastern district of Missouri a certain petition in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court.

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
CHARLES TAUSSIG and MORRIS TAUSSIG, *Defendants.*

The plaintiff, a citizen of the State of Maryland, complains of the defendants, citizens of the State of Missouri, and who, in the year 1865 and long afterward, with one J. H. Livingston, constituted the firm of Taussig, Livingston & Company, and for cause of action states that in the year 1865 the General Assembly of the State of Virginia passed an act, approved

December 12th, 1865, entitled "An act to amend and re-enact an act to incorporate the Southern Express Company, passed March 22, 1861, and to incorporate the National Express and Transportation Company;" that by said act it was, among other things, provided that Joseph E. Johnson and other persons therein named, together with their associates, successors, and assigns, were, and they were declared to be, a body corporate and politic, by the name of the National Express and Transportation Company, sometimes called the National Express Company, for the purpose of an express and transportation business, and as such should have perpetual succession and might sue and be sued, implead and be impleaded, contract and be contracted with; and it was further provided that the capital stock of said company should be $5,000,000 (with the privilege of increasing the same to a sum not exceeding $10,000,000), to be divided into shares of $100 each, and that the principal office of said company should be kept at the city of Richmond, in the State of Virginia.

Plaintiff further states that in the year 1865 defendants, in their said firm name, with many other persons, executed an instrument of subscription to the capital stock of said company in words and figures following:

Subscription List to the Stock of the National Express Company.

We, the undersigned, hereby subscribe the amount and the number of shares opposite our names to the stock of the National Express Company, and bind ourselves, our heirs, &c., to pay said amount in such installments as may be called for by said company and to pay one per cent. at the time of subscription.

That the number of shares set opposite the name of defendants' said firm in said list was one hundred, and the amount was ten thousand dollars; that defendants became

and were the holders of over one hundred shares of stock in said company, and were accepted by said company as such, and that said shares, on the 14th day of December, 1880, and before and ever since that date, have stood on the books of said company in the name of defendants' firm; that by so subscribing and holding said shares defendants agreed and bound themselves, their heirs and legal representatives, to pay to said company, as they should be thereunto required by said company and the president and directors thereof or other lawful authority, the sum of one hundred dollars for each of said shares.

Plaintiff states that said company was duly organized under said act and entered upon the transaction of business, with its principal office in said city of Richmond, and that afterwards, having become embarrassed in its affairs, on the 20th day of September, 1866, said company executed a deed of trust, whereby it granted and conveyed to John Blair Hoge, John J. Kelly, and C. Oliver O'Donnell all its estate, property, rights, and credits of every kind, including all effects and moneys payable to said company, whether on calls or assessments on stock of the company or on notes or otherwise, in trust that the said grantees should collect and dispose of said assets and apply the net proceeds thereof to the payment of the debts of said company.

Plaintiff states that after the execution of said deed one William W. Glenn, a judgment creditor of said company, on behalf of himself and of such other creditors as should choose to be made parties thereto, brought his bill in the chancery court of said city of Richmond, a court of competent jurisdiction, invested by law with all the powers usually possessed by a court of chancery, against the said National Express and Transportation Company and said Hoge, Kelly, and O'Donnell and other persons, officers and directors of said company, the general nature and object of which bill was to cause an account to be taken of the indebtedness of said company to said William W. Glenn and all its other

creditors, to ascertain and settle the validity, scope, and effect of said deed and the powers, duties, and rights of said trustees thereunder, and especially to ascertain and determine whether the unpaid or uncalled stockholders' liability passed by it to said trustees and was to be collected by them, and, if said deed should be held valid, to decree the execution of the trusts thereof; to remove the said trustees and to substitute some other persons or person in the execution of said trusts; to cause a call or assessment to be made upon and against the stockholders of said company, and to authorize and require the said trustees or their successors or successor to collect such assessment from said stockholders; that in said suit process was duly served on said company and on Hoge and Kelly (said O'Donnell having in the meantime departed this life), and said company and said Hoge and Kelly appeared to said suit; that such steps were afterwards taken therein that on the 14th day of December, 1880, a decree was entered in said cause adjudging that under the laws of the State of Virginia said deed of trust was a good and valid conveyance; that its effect was to vest and that it did vest in said original trustees all the estate, property, rights, and credits of said company of every kind and wherever situated or being, including the credits allowed by statute and by said company to its stockholders for the uncalled and unpaid part of the several subscriptions to its capital stock and the right to receive and collect the same according to the terms of the said contracts of subscription; removing said surviving trustees, Hoge and Kelly, from office and in their room and stead appointing the present plaintiff, John Glenn, as sole trustee, clothing him with all the rights and powers, and charging him with the execution of the trusts of said deed to the same effect as were the said original trustees, and requiring him to give a bond, with sureties, in the sum of one hundred thousand dollars, for the faithful performance of his duties as such substituted trustee; establishing and allowing the claims of numerous creditors to the amount,

including interest, of $509,392.41; finding that $20.00 per share and no more had been called by the board of directors on the stock of said company, and that $80.00 per share remained uncalled; that all calls made by the board of directors had either been exhausted or were then unavailable; that said company had no other assets for the payment of its debts; that the uncalled part of the subscriptions constituted a trust fund in the hands of the stockholders of said company for the benefit of its creditors; that it was necessary that 30 per cent. of said subscriptions should be called in order to meet the expenses of administering said trusts and paying the debts of said company; that said company had long ceased and abandoned its business, and that for about fourteen years there had been no meeting of its stockholders or board of directors; adjudging and making a call upon the stockholders of said company of thirty dollars per share of their stock; requiring said stockholders and each and every one of them and their legal representatives and assigns to pay to this plaintiff the amounts severally due from them under said call, and authorizing and directing this plaintiff to collect said call by suit or otherwise; and plaintiff states that he accepted said trust, and on the 3d day of January, 1881, qualified by giving bond as required by said decree.

Plaintiff states that by reason of their ownership of stock in said company, as above stated, and by virtue of said decree defendants became and are bound to pay plaintiff the sum of three thousand dollars, with interest from December 14th, 1880, at the rate of six per cent. per annum.

Plaintiff states that in the year 1884 he instituted suit in this court against defendants to enforce this liability; that on the 15th day of July, 1885, plaintiff suffered a nonsuit in said case. Wherefore plaintiff prays judgment against defendants for the sum of three thousand dollars, with interest as aforesaid, and for his costs.

For another cause of action plaintiff states that the suit

instituted in the chancery court of the city of Richmond, as aforesaid, was after the 14th day of December, 1880, transferred to the circuit court of the county of Henrico, in the State of Virginia, a court of competent jurisdiction, and that such further steps were therein taken that on the 26th day of March, 1886, a further decree was entered in said cause adjudging that for the payment of a large balance of the indebtedness of said company so established as aforesaid it was necessary and proper to make a call for the residue of fifty per cent. remaining uncalled for and unpaid upon the capital stock of said company and ordering and decreeing that a call and assessment be made, and the same was thereby made, upon the capital stock and the stockholders of said company of fifty dollars on each and every share thereof, and requiring the stockholders of said company and each and every of them and their legal representatives and assigns to pay the several amounts thereby called for to this plaintiff, and authorizing and requiring this plaintiff to collect and receive said call and assessment, and to take such prompt steps toward that end by suit or otherwise and in such jurisdictions as he might be advised.

Plaintiff further states that by reason of their ownership of stock in said company, as hereinabove stated, and by virtue of the decree last mentioned defendants became and are bound to pay to plaintiff the sum of five thousand dollars, with interest from March 26th, 1886, at the rate of six per cent. per annum. Wherefore plaintiff prays judgment for said sum, with interest, and for the costs of this suit.

T. K. SKINKER,
Attorney for Plaintiff.

Upon the filing of said petition there was issued out of the clerk's office of said court a writ of summons, which, with the marshal's return of service endorsed thereon, is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, } *sct:*

In the Circuit Court of the United States in and for the Eastern Division of said District.

The President of the United States of America to the marshal of the United States in and for said district, Greeting:

You are hereby commanded to summon Charles Taussig and Morris Taussig, citizens of the State of Missouri, that they be and appear before the honorable circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, on the first day of the next term thereof, to be holden at the city of St. Louis, in and for the eastern division of said district, on the third Monday of September next, then and there to answer the complaint of John Glenn, trustee of the National Express and Transportation Company, a citizen of the State of Maryland, as set forth in the petition filed in said court on the twelfth day of July, A. D. eighteen hundred and eighty-six.

Hereof fail not and have you then and there this writ.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the twelfth day of July, A. D. eighteen hundred and eighty-six.

Issued at office, in the city of St. Louis, under the seal of said circuit court, the day and year last aforesaid.

[SEAL.] A. P. SELBY, *Clerk.*

UNITED STATES OF AMERICA,
Eastern Division of the Eastern
Judicial District of Missouri, } *sct:*

I hereby certify that I have executed this writ by delivering a true copy of same, with a copy of the complaint thereto attached, to the within-named defendant, Charles Taussig, on the 19th day of July, A. D. 1886, at St. Louis;

and I further certify that I have executed this writ by delivering a true copy of same to the within-named defendant, Morris Taussig, on the 12th day of August, A. D. 1886, at St. Louis, in above district.

J. E. D. COUZINS,
U. S. Marshal, Eastern District of Missouri,
By JOHN E. COUZINS, *Deputy.*

And afterwards, to wit, on the twenty-fifth day of September, A. D. 1886, there was filed in said cause a demurrer to the petition in words and figures following, to wit:

(*Demurrer to Petition.*)

In the Circuit Court of the United States, Eastern District of Missouri. September Term, 1886.

JOHN GLENN, *Trustee, &c., Plaintiff,*
vs.
CHARLES TAUSSIG *et al., Defendants.*

Now come the defendants in the above-entitled cause, by their attorneys, and demur to the complaint or petition filed herein by plaintiff and to the several causes of action alleged in said complaint for the reasons—

That said complaint does not state facts sufficient to constitute a cause of action against these defendants.

That the alleged causes of action stated in said complaint accrued more than five years before the commencement of this suit and before the nonsuit mentioned in plaintiff's complaint was suffered.

That the alleged causes of action stated in said complaint are barred by the laches and negligence of plaintiff and of his predecessors in trust.

That the assessment of thirty per cent. upon the stock of the National Express and Transportation Company alleged to have been made by the chancery court of Richmond in December, 1880, and the subsequent assessment of fifty per

cent. alleged to have been made by the circuit court of Henrico county, Virginia, on March 26th, 1886, are void and of no force or effect against these defendants; that in the proceedings in which said assessments are alleged to have been made the said courts had and acquired no jurisdiction over these defendants, nor had said courts or either of them jurisdiction therein to make or adjudge assessments against the stockholders of the National Express and Transportation Company.

BOYLE, ADAMS & MCKEIGHAN,
Attorneys for Defendants.

And afterwards, to wit, on the twenty-seventh day of September, A. D. 1886, the following, among other, proceedings were had and appear of record in said cause, to wit:

(*Demurrer Submitted.*)

JOHN GLENN, *Trustee, Plaintiff,*
vs.
CHARLES TAUSSIG *et al., Defendants.* } 2673.

Now come the parties, by their attorneys, and the demurrer to the petition herein is argued by counsel and submitted, and by the court taken under advisement.

And afterwards, to wit, on the sixteenth day of October, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

(*Demurrer Sustained.*)

JOHN GLENN, *Trustee, Plaintiff,*
vs.
CHARLES TAUSSIG *et al., Defendants.* } 2673.

Now come the parties, by their attorneys, and the court, having considered the demurrer to petition heretofore sub-

mitted, finds the law thereon for the defendants and orders that said demurrer be, and the same is hereby, sustained.

And afterwards, to wit, on the third day of November, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

(*Judgment on Demurrer.*)

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
CHARLES TAUSSIG *et al., Defendants.* } 2673.

Now come again the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendants by Boyle, Adams and McKeighan—and, the demurrer to the petition having been heretofore sustained (the court being of opinion that the statute of limitations is a bar to this action) and the plaintiff electing to abide by his said petition, the court orders that judgment be now entered upon said demurrer for defendants.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendants, Charles Taussig and Morris Taussig, go hence without day and have and recover of the plaintiff, John Glenn, trustee of the National Express and Transportation Company, their costs herein expended and have thereof execution.

And thereupon the plaintiff, by attorney and by leave of court, files motion for a new trial.

And afterwards, to wit, on the fourteenth day of December, A. D. 1886, the following further proceedings were had and appear of record in said cause, to wit:

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff,*
vs.
CHARLES TAUSSIG and MORRIS TAUSSIG, *Defendants.* } 2673.

Now come the parties, by their attorneys—the plaintiff by T. K. Skinker and the defendants by Boyle, Adams and McKeighan—and by consent the judgment entered herein on November 3, 1886, is set aside; and thereupon the plaintiff, by consent, files amended petition, to which defendants file demurrer; and the court, having considered said demurrer to amended petition, finds the law thereon for the defendants and orders that the same be sustained; and, the plaintiff electing to abide by his said amended petition, it is ordered by the court that judgment be now entered upon said demurrer for defendants.

It is therefore considered by the court that the plaintiff take nothing by his writ herein; that the defendants, Charles Taussig and Morris Taussig, go hence without day and have and recover of the plaintiff, John Glenn, trustee of the National Express and Transportation Company, their costs in this behalf expended, and that a fee bill or execution issue therefor.

And thereupon the plaintiff, by attorney, presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing the said defendants to be and appear at a Supreme Court of the United States on the first day of the next term thereof, to be begun and held at Washington, D. C., on the second Monday of October next, which said writ of error is allowed and said citation signed by the judge; and said plaintiff also presents to the court his bond in the penal sum of five hundred dollars, which bond is approved and ordered to be filed as part of the record herein.

UNITED STATES OF AMERICA.
Eastern Division of the Eastern
Judicial District of Missouri, } *ss:*

I, A. P. Selby, clerk of the circuit court of the United States in and for the eastern division of the eastern judicial district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the pleadings and proceedings prior to the 14th day of December, A. D. 1886, when an amended petition was filed, as appears of record, and also the order of December 14th, 1886, permitting said amended petition to be filed in case No. 2673, of John Glenn, trustee of the National Express and Transportation Company, plaintiff, against Charles Taussig and Morris Taussig, defendants, being the same case in which a writ of error was sued out on December 14, 1886, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office, in the city of St. Louis, in the eastern division of said district, this ninth day of April, in the year of our Lord eighteen hundred and ninety.

[SEAL.] A. P. SELBY,
Clerk of said Court.

Wherefore plaintiff prays the Court to cause its writ of certiorari to be issued to the clerk of the circuit court of the United States for the eastern division of the eastern judicial district of Missouri, requiring him forthwith to return unto this Court, under his hand and the seal of said court, true copies of the said original petition, summons, return, demurrer to the original petition, and order sustaining said demurrer.

JOHN GLENN,
Trustee of the Nat'l Express and Transportation Company.

In the Supreme Court of the United States.

JOHN GLENN, *Trustee of the National Express and Transportation Company, Plaintiff in Error,*
vs.
CHARLES TAUSSIG and MORRIS TAUSSIG, *Defendants in Error.*

DISTRICT OF MARYLAND, *sct:*

I, James W. Chew, clerk of the circuit court of the United States in and for the district of Maryland, do certify that on this 12th day of April, A. D. 1890, personally appeared before me, in the city of Baltimore, in the district aforesaid, John Glenn, the person named in the foregoing petition and motion, and made oath in due form of law that the matters and things stated in said petition and motion are true to the best of his knowledge and belief; and the said John Glenn did further make oath that he was not informed of the omission and neglect of the clerk of the circuit court of the United States for the eastern district of Missouri to transmit a full and complete transcript of the record of the proceedings of the said circuit court in this case to this Court until after the printing of the record in this Court; and he did further make oath and depose that the actual question intended to be brought before this Court by the writ of error in this case was not whether this suit was instituted within the time prescribed by the statute of limitations of the State of Missouri after the rendition of the decree of the chancery court of the city of Richmond referred to in the record, but whether the cause of action in this case did not in fact arise before the said decree; and deponent further made oath that, the record in this Court being sufficient to present to this Court the question as to whether the statute of limitations began to run from the date of said decree or before said decree, and that having been in fact the question passed upon by the circuit court, the attention of this deponent was diverted

from the fact that by the error of the clerk of the circuit court of the United States for the eastern district of Missouri in omitting to transmit a complete copy of the record of the case to this Court the record in this Court is made to present the question which was not in fact presented or tried in the court below—that is to say, the question whether this suit was brought within the time prescribed by the laws of Missouri after the date of the decree aforesaid. Deponent further made oath, as aforesaid, that his attention to the imperfect condition of the record in this Court was further diverted by the fact that the actual question intended to be brought before this Court in this case was brought before the Court in the case of this deponent *vs.* Hawkins, reported in 132 U. S., and that by leave of Court counsel from Missouri was permitted to appear and argue the said case of Hawkins, because, as was alleged, the issue in that case as to the time when the statute of limitations would begin to run was the same as in this case and another case from the Missouri circuit pending in this Court. This deponent was thereby led to assume that the record in this case sufficiently presented the real question intended to be brought before this Court by the writ of error, and his attention was diverted from the fact that the incompleteness of the record raised another question that did not exist in fact and was not passed upon by the circuit court.

Deponent further made oath that as soon as his attention was called to the imperfection of the record he took measures to have the same remedied without delay, and he says that if this Court shall grant his petition the return to the writ of certiorari will be made in full time to have the complete record of the case in this Court before the case is called for argument.

And further this deponent saith not.

JOHN GLENN, *Trustee.*